86-881 (1)

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND DANIEL J. SHANNON,
Petitioners,

v.

KRAFTCO, INC., d/b/a
Sealtest Foods Division,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

When bringing a collection action under ERISA and the LMRA, are the trustees of a multiemployer pension fund bound by a secret agreement between a union and an employer which the fund has had no opportunity to reject, which attempts to reduce the employer's contribution obligations under its collective bargaining agreements, and which, by omitting contributions for three years on covered employees, is inconsistent with ERISA's minimum criteria for participation, vesting, and benefit accrual and therefore creates unfunded liabilities chargeable against the Plan?

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Sealtest Foods Division,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Central States, et al. respectfully petition this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit, entered on September 2, 1986.

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[1] Daniel J. Shannon was the Executive Director of the Pension Fund at the time the Fund's action was commenced in the District Court (April 20, 1978). George W. Lehr is currently the Fund's Executive Director.

[2] Because the District Court refused to join the union as a necessary party in the Pension Fund's action, Kraft filed a separate declaratory judgment action against Local 327 on February 6, 1979. The District Court consolidated this action with that of the Pension Fund but then dismissed it. *Kraft, Inc. v. Local Union 327, Teamsters, etc.*, 527 F. Supp. 420 (M.D. Tenn. 1981). Kraftco appealed. Appeal was pending when the Pension Fund's suit came on for a bench trial, March 15, 1982. On June 23, 1982, the Court of Appeals for the Sixth Circuit reversed the order of dismissal. *Kraft, Inc. v. Local Union 327, Teamsters, etc.*, 683 F.2d 131 (6th Cir. 1982). Kraftco and the union stipulated that a new trial was not necessary in order to adduce further evidence and that the issues raised in Kraftco's suit against the union could be resolved based on the record made on March 15, 1982 (A 3-4). Although the decisions relevant to this appeal are predicated on the District Court's original order of consolidation (March 29, 1979), this Petition is filed only on behalf of the Pension Fund and seeks review only of the Pension Fund's action. (All materials contained in the Appendix to this Petition are referred to by the letter "A" followed by page number.)

OPINIONS BELOW

The opinion of the District Court for the Middle District of Tennessee is reported at 589 F. Supp. 1061 (App. A). The opinion of a panel of the Court of Appeals for the Sixth Circuit is not reported and is set forth in App. B. The *en banc* opinion of the Court of Appeals is reported at 799 F.2d 1098 (App. C).

JURISDICTION

The Judgment of the Court of Appeals was entered on September 2, 1986 (App. D). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* (ERISA), and the Labor Management Relations Act of 1947, 29 U.S.C. § 141, *et seq.* (LMRA), are set forth in App. I.

STATEMENT OF THE CASE

1. Introduction: Overview of Issues and Petitioners' Position

The Central States, Southeast and Southwest Areas Pension Fund, an employee benefit trust established in accordance with Section 302(c)(5) of the LMRA and governed in accordance with ERISA, is one of the largest Taft-Hartley trust funds in the United States, serving some 500,000 active employees, retirees, and their families.[3] Some 12,000 employers in 40 states contribute to the Pension Fund pursuant to thousands of collective bargaining agreements with local unions affiliated with the International Brotherhood of Teamsters. The present dispute arose when the Pension Fund attempted to collect delinquent contributions from Kraftco, a contributing employer since 1960, pursuant to the terms of a series of collective bargaining agreements which required contributions on behalf of covered employees after 30 or 90 days depending on job classification, i.e. upon such employee's completing his probationary period and achieving the status of a "regular" employee.

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[3] See *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 105 S. Ct. 2833, 2836 (1985); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 373 (1984).

Kraftco denied that it was obligated to make contributions in accordance with the terms of these collective bargaining agreements. Rather, Kraftco urged that its collectively-bargained obligations — for all periods from 1969 to 1978 — had been "clarified" by a "side letter agreement" with an authorized representative of the local union which permitted the company to withhold contributions on covered employees until they had completed 36 months of service. The side letter was executed on June 26, 1969 in response to the International Union's insistence that a 36-month waiting period was unacceptable and could not appear in the collective bargaining agreement. Moreover, the letter was never disclosed to the Pension Fund which only learned of the deviant contributions in 1978, at which time a collection action was immediately filed.

Under the LMRA, trustees of employee benefit funds were commonly regarded as donee third-party beneficiaries of collective bargaining agreements whose rights and obligations were largely derivative of these contracts. This status has changed with passage of ERISA in that ERISA requires trustees of pension funds to adhere to minimum standards for participation, vesting, and benefit accrual regardless of inconsistent terms of a collective bargaining agreement, 29 U.S.C. § 1104(a)(1)(D), and regardless of whether an employer has made or defaulted on his contribution obligations. 29 U.S.C. §§ 1052, 1053, 1054; DOL Advisory Opinions 76-89 and 78-28 (A 158-163).. ERISA also requires trustees to comply with minimum funding standards, 29 U.S.C. § 1082, to keep an account of the total number of plan participants, and to inform all participants and beneficiaries of their rights under the plan. 29 U.S.C. §§ 1021-25.

The effectiveness of these provisions and thus the fiscal health of pension funds depends upon full disclosure to trustees not only of all collective bargaining agreements setting forth the employer's contribution obligations but of any modifications or clarifications of these agreements which attempt to alter or reduce these obligations to the fund. Without such disclosure, fund trustees remain in the dark as to the size and identity of the participant pool and hence the full scope of their statutory obligations and liabilities. Thus, they are impeded in setting appropriate benefit levels that

are reasonably related both to anticipated income derived from employer contributions and to anticipated liability for the vested benefits of a known participant census. Similarly, they cannot identify or provide information to participants who have not been reported to the fund as the result of a secret side agreement. Finally, absent full disclosure, they are deprived of an opportunity to reject an agreement that fails to conform with the standards of ERISA or of the plan, and are thus powerless to prevent underfunding and actuarial harm.

Kraftco's side agreement illustrates the problem. Under 29 U.S.C. § 1052(a)(1)(A), a *plan* may not defer participant status for more than *one year* (A-128). While Kraftco's collective bargaining agreements conformed with ERISA since contributions were required after 30 or 90 days, Kraftco's secret side agreement, by omitting contributions for *three* years, created unfunded liabilities chargeable to the Pension Fund without its knowledge or consent. Notwithstanding Kraftco's side agreement, employees covered by the collective bargaining agreements would acquire participant status after one year and vest ten years from the commencement of employment. At this time, the Pension Fund would owe them an accrued benefit for each year of participation (i.e. nine years). Since Kraftco's contributions would have covered only seven of these ten years, the Pension Fund would be forced to subsidize the additional two years from fund assets derived from the entire contribution pool, thereby depleting the pool with adverse consequences to the Fund's actuarial soundness. Under the Sixth Circuit's ruling, these sums could not be recouped.

Believing that Kraftco's side letter agreement was an "obvious attempt to circumvent the language of the collective bargaining agreement," that pension funds have the right to rely on collective bargaining agreements, and that enforcement of the 36-month deferral period would cause actuarial harm to the Pension Fund, the District Court found that the side agreement was unenforceable and conflicted with the policy concerns underlying the "writing" requirement of Section 302(c)(5) of the LMRA. In so ruling, the Court recognized that an undisclosed writing has the same effect as a prohibited oral agreement and should be treated

in the same way. (The District Court also found that the side agreement had not been ratified by affected employees.)

A panel of the Court of Appeals affirmed. After first denying Kraftco's Petition for Rehearing *en banc*, the Court then took the case for review and unanimously reversed. Without referring to ERISA and believing that 302(c)(5) was either inapplicable or had been satisfied, the Court held that the side agreement was enforceable. The Court reasoned that whether or not the agreement had been ratified by affected employees, Kraftco had the right to rely on the apparent authority of the union representative and noted that it was the clear intention of the parties to withhold contributions for 36 months. Evidently treating the union and the Pension Fund as one and the same, the Court did not address the distinctions between labor law and pension law or between collective bargaining and trust administration. The Court therefore failed to recognize the harm that will occur to pension funds if undisclosed side agreements are enforced regardless of their failure to conform with ERISA or with the participation requirements of a particular plan based solely upon the union's apparent authority to execute agreements with employers concerning the terms and conditions of employment.

Although this case appears to be one of first impression, immediate review is urgent because the Sixth Circuit's *en banc* ruling may be taken as an invitation to employers and unions to enter into collective bargaining agreements as a facade while couching their real agreement in a quite different and undisclosed document. Because of the statutory obligations created by ERISA, such a practice would inevitably lead to plan underfunding and increased risk to participants and beneficiaries, a result that Congress cannot have intended and one that is at odds with numerous decisions of this Court.

2. Facts

Kraftco d/b/a Sealtest Foods operates a milk plant and an ice cream production plant in Nashville, Tennessee. Employees at these plants have been represented by Local 327, affiliated with the IBT, since the 1950s. In 1960, Kraftco first began to contribute to the Central States Pension Fund

pursuant to collective bargaining agreements with Local 327. (A-4, 109).

Prior to 1971, Local 327 executed three separate collective bargaining agreements covering three separate bargaining units of Kraftco's employees: milk plant employees; ice cream production and maintenance employees; ice cream route salesmen. Contributions for route salesmen were always required after the completion of 90 days of employment, at which time these employees completed their probationary period. Although milk plant and ice cream production employees completed their probationary periods after 30 or 90 days, depending on job classification, the collective bargaining agreements covering the years 1965-1968 provided — for the first time — that contributions to the Pension Fund would *not* be made on behalf of these employees before the completion of *36 months of service*. (Exh's. 5, 10: PTO; A-5, 85).

Negotiations for the 1969-1971 collective bargaining agreement covering milk plant employees commenced first. During these negotiations, a representative of the IBT appeared and insisted that the 36-month deferral period be deleted from the new contract. At the bargaining table, both sides agreed to delete the 36-month provision. (A-6). Accordingly, Article XII of the 1969-1971 contract provided that contributions would be made on behalf of "each employee covered by the Agreement upon his becoming a regular employee." (Exh. 6, PTO; A-90). Article 1B of the agreement defined a "regular" employee as one who had completed his 30 or 90 day probationary period. (A-89). This collective bargaining agreement, although not yet in printed form, was ratified on June 27, 1969 in accordance with the by-laws of Local 327. (Tr. 148; A-6).

On June 26, 1969, two representatives of Kraftco (T.M. Rose and Don Spencer) met with Don Vestal, President and Business Agent of Local 327. The District Court found that the purpose of this meeting was "to discuss circumventing the language of the new contract that had been insisted upon by the International Union's representative." (A-6). No member of the union negotiating committee was present. (Tr. 116; A-6). The disputed side letter arose from this meeting. This letter, which was drafted by Spencer and signed by Rose, Spencer, and Vestal, provided:

> As per our conversation of *June 26, 1969*, and *our agreement of such time*, Sealtest Foods will continue to commence regular pension payments on our employees when such employees have been in our employ for a period of thirty-six (36) months. Said pension payments shall then continue as stipulated in our *present labor agreement*. (A-98, emphasis added).

The letter also stated: "this may require some possible discussion and adjustment for some specific individuals during the life of our labor agreement." The District Court found, as a matter of fact, that the side letter was not presented to the union membership for ratification on June 27, 1969 or at any other time. (A-8).

In August, 1969, negotiations took place for the 1969-1971 collective bargaining agreement covering ice cream production and maintenance workers. The 36-month waiting period was also deleted from this contract which provided, instead, that contributions would be made for all "eligible" covered employees, i.e. employees who had completed their respective 30- or 90-day probationary period. (A-8, 108). As of 1969, then, the *collective bargaining agreements* required pension contributions for all of Kraftco's employees represented by Local 327 either after 30 or 90 days.

It is undisputed that the simple, unambiguous 36-month deferral language was never restored to any collective bargaining agreement after 1969. The side letter itself does not refer to any collective bargaining agreement but the concurrently executed contract covering milk plant employees. Both Spencer and Rose testified that the side letter was intended to remain in force and effect in perpetuity, i.e. "until it changed" or was "negotiated out." (Tr. 74, 87; A-8). Spencer testified that the side agreement was never mentioned in negotiations for subsequent collective bargaining agreements. (Tr. 124). No testimony indicated that affected employees knew of the side letter after 1969. The Court of Appeals accepted the employer's contention that the side letter was a "clarification" of an ambiguous term of all collective bargaining agreements after 1969 (A-68).

In 1971, Don Vestal was ousted from office for corruption and financial malpractice. (A-10). At this time, the IBT

imposed a trusteeship on Local 327, the lawfulness of which was affirmed by the Sixth Circuit. *Vestal v. Hoffa*, 451 F.2d 706 (6th Cir. 1971). The Trustee appointed Billy Burrows business agent of Local 327. Burrows subsequently participated in the negotiation of all collective bargaining agreements with Kraftco. It was undisputed that no one from Kraftco showed the side letter to Burrows or to any of the new union leadership. (A-11). A search of Local 327's files failed to disclose a copy of the side agreement. (Tr. 157, 159).

Kraftco representatives testified that the purpose of the side letter was to permit the company to increase wages. Because the turnover rate was higher among milk plant and ice cream production employees than among route salesmen, Kraftco believed that the Pension Fund would receive a "windfall" if contributions were required on behalf of employees who would never be eligible for benefits. (A-5, 13). Jack Yarbrough, Operations Director of the Pension Fund, stated that the Fund would be required to provide benefits to Kraftco's employees in accordance with the terms of the collective bargaining agreements and that absent corresponding contributions from Kraftco, the corpus of the trust would be reduced which would endanger the actuarial soundness of the Fund and hence the rights of all of its participants and beneficiaries. (Jt. App. 256-261; A 109-114; Complaint, A-102). The District Court rejected Kraftco's "windfall" objection in recognition of the actuarial assumptions underlying a pooled Taft-Hartley trust. (A 26-27). The Court of Appeals did not address this issue and did not refer to the Fund's liabilities under ERISA.

Nine letter agreements between Kraftco and a union representative, which had not been formally ratified, were submitted into evidence. The District Court observed that only two were executed *prior* to 1969 and hence did not constitute a course of dealing justifying Kraftco's reliance on Vestal's authority to perpetuate the 36-month contribution practice. The District Court also noted that the subject matter of these other agreements was qualitatively different from the side letter affecting pension contributions and did not diminish the rights of bargaining unit employees without their knowledge or consent. (A-23). The Court of Appeals found that these letters constituted a representation by the

union that its representatives had at least apparent authority to execute binding contracts affecting terms and conditions of employment without ratification. (A-68).

The District Court's conclusion that Kraftco did not justifiably rely on Vestal's authority to execute the 1969 side letter agreement is supported by statements made by Vestal and by Spencer in Affidavits attached to Kraftco's Motion for Summary Judgment (in its action against the union). While both affiants state that the purpose of the side letter was to increase wages, they both also admit that this purpose could not be effectuated through the collective bargaining agreement because of the IBT's insistence that the 36-month deferral provision had to be changed. Thus, Spencer states that the side letter permitted "Local 327 to handle its apparent 'political purposes'" (A-104) while Vestal states that "[l]ocal unions, for obvious reasons, don't like to get into conflicts with the International." (A-108). Moreover, the side letter itself recognizes that employees may be harmed unless "some adjustments" are made with respect to individual employees who subsequently apply for pensions.

In late 1977, one of Kraftco's milk plant employees inquired about his pension status and was informed that no contributions had been made for the first three years of his employment. The employee contacted Billy Burrows who learned from Kraftco's payroll clerk that she had been instructed to withhold payments until an employee completed three years of service. (Tr. 153-154; A-11). When Burrows confronted Kraftco, the company immediately began to make contributions in accordance with the terms of the collective bargaining agreement. However, the company refused to make past due contributions.

It is undisputed that the Pension Fund never received a copy of the side letter agreement. Moreover, the reports submitted to the Fund together with monthly remittances did not contain the hiring date of employees for whom contributions were being made. (A-11). Hence, the Fund did not and could not know that Kraftco was withholding contributions on covered employees for 36 months. This concerned the District Court. (A 25-26). The Court of Appeals evidently did not believe that the Fund's lack of knowledge was significant.

On March 27, 1978, the Fund was informed of the side agreement and suit was filed a few weeks later. During the pendency of the District Court action, two Kraftco employees applied for pensions. The Pension Fund credited them with the 36 months of service they had earned pursuant to the terms of the collective bargaining agreement and awarded appropriate pensions. (A-13, 112).

3. Statutory Context

The full significance of Kraftco's failure to disclose the side agreement to the Pension Fund is revealed by a brief examination of the statutory background upon which the Fund's claim is premised.

In 1947, Congress enacted Section 302(c)(5) of the LMRA (29 U.S.C. § 186(c)(5)) in order to assure that employees would actually receive the benefits which the fruits of their labor had earned. To this end, employers were prohibited from making and funds were prohibited from accepting contributions except on the basis of detailed written agreements specifying how payments were to be remitted and disbursed. The "writing" requirement was intended to provide employees with notice of their entitlements so that they could enforce them in a court if necessary. 93 Cong. Rec. S 4876, 4883 (May 8, 1947).

In 1974, Congress enacted ERISA for the purpose of providing enhanced protection to fund participants and beneficiaries. Among the goals to be promoted by the new Act were: the establishment of "standards of conduct, responsibility and obligation for the fiduciaries of employee benefit plans;" adequate disclosure to participants; and adherence to minimum funding, participation, and vesting standards. (29 U.S.C. § 1001).

29 U.S.C. § 1059 requires every employer contributing to a plan to furnish the plan administrator with whatever records are necessary to enable the administrator to inform each "employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan." 29 U.S.C. § 1145 creates a statutory cause of action, enforceable by trustees under 29 U.S.C. § 1132(a)(3), if an employer fails to make contributions in accordance with the terms of the collective bargaining

agreement. A duty to disclose not only the collective bargaining agreement but any modifications or clarifications of the contract are encompassed by the above provisions of the LMRA and ERISA.

29 U.S.C. § 1052(a)(1) prohibits a pension plan from deferring participant status beyond "the date on which [an employee] completes one (1) year of service," defined as a 12-month period during which the employee has completed 1,000 hours of service with the employer or employers maintaining the plan. 29 U.S.C. § 1052(a)(3)(A). An "hour of service" is one for which compensation has been paid or is required. 29 C.F.R. § 2530.220b-2(a)(1). Eligibility for participation is therefore a function of hours worked, not employer contributions.

In accordance with 29 U.S.C. § 1053, a participant "vests" upon completion of ten years of service (or less) at which time he has a nonforfeitable right to some or all of his accrued benefits derived from employer contributions. In computing the employee's service for purposes of vesting, "all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account." 29 U.S.C. § 1053(b)(1). (Some exceptions not relevant to this case are enumerated in 29 U.S.C. § 1053(b)(1)(A)-(G)). "Years" and "hours" of service for purposes of vesting are the same as "years" and "hours" of service for purposes of participation. 29 U.S.C. § 1053(b)(2)(A) and (B). The "eligibility year" that counts toward participation is included in the ten years required for vesting. Indeed, pre-participation service and service performed before the effective date of ERISA is also counted.

"Benefit accrual" is based on "years of participation." 29 U.S.C. § 1054(b)(3)(A). Under one method of computation, a participant is entitled to no less than 3% of his normal retirement benefit for each year of participation in the plan. Although service prior to participation may be disregarded, participants in plans that existed prior to September 2, 1974 are entitled to an accrued benefit for pre-ERISA service of not less than half the amount to which they would be entitled for post-ERISA service. 29 U.S.C. § 1054(b)(1)(D).

DOL Advisory Opinions 76-89 (August 31, 1976) and 78-28 (December 5, 1978) (A 158-163) make clear that a plan would have to comply with ERISA's minimum standards for participation, vesting, and benefit accrual regardless of whether an employer has made or defaulted on his contribution obligations. In accordance with 29 U.S.C. §§ 1052-1054, as construed by these DOL Advisory Opinions, Kraftco's employees would be eligible for participation after one year (1,000 hours) of service notwithstanding the company's 36-month deferral policy. Likewise, they would "vest" ten years from the date employment commenced. Finally, they would be entitled to nine years of benefit accrual (or not less than 27% of their normal retirement benefit) even though Kraftco only made seven years of contributions. (Central States' requirements are more generous in that credit toward participation commences after 30 days in covered employment; once participant status is achieved, vesting and benefit accrual also relate back to the 31st day of employment.)

4. Proceedings Below

As framed by the District Court, the basic issue for resolution was whether the side agreement had any effect on the collective bargaining agreements between Kraftco and Local 327. This issue was broken down into a number of subissues: 1) if the side agreement was valid, did it affect only the concurrently executed 1969-1971 contract covering milk plant employees or did it modify all collective bargaining agreements from 1969 to 1978; 2) if the side agreement was invalid, was the Pension Fund entitled to the amount sued for or would enforcement of the collective bargaining agreements provide a "windfall"; 3) should the Fund be entitled to collect the amounts claimed if Kraftco justifiably relied on the side letter even if this agreement was invalid? (A 13-14).

On May 9, 1984, following a bench trial and after reviewing all the evidence presented as well as the briefs and arguments of counsel (A-4), the Court issued a lengthy decision, drafted as formal "Findings of Fact" and "Conclusions of Law," and awarded the Pension Fund the stipulated amount of $246,395.00 (A-27). The Court found that: the side letter was an obvious attempt to circumvent the language of the collective bargaining agreements and had not been ratified

by the membership at any time (A-23); Don Vestal had no authority to execute the agreement and Kraftco knew or should have known that Vestal lacked authority (A-23); the manner in which the side agreement had been brought about and was maintained constituted a violation of Section 302(c)(5) of the LMRA (A 23-24); the "Fund's right to expect proper contributions from Kraftco could not be undermined by secret side agreements in which the Fund's Trustees never participated" (A-26); and enforcement of the collective bargaining agreements was necessary to prevent actuarial harm to the Fund and thus did not endow it with a "windfall."

The Court noted that in pooled multiemployer trusts established by collective bargaining, there is no "precise and personal" correlation between any individual employer's contributions and the benefits received by that employer's employees. Rather, a trust such as the Central States Pension Fund operates on the actuarial assumption that some employees for whom contributions are made will never be eligible for benefits whereas other employees who will become eligible will not have been completely funded by the contributions of their own employer(s). The Court thus recognized that Kraftco's willingness to tender past due contributions for individual employees applying for pensions would not "make whole" the Pension Fund which lost three years of contributions on behalf of two entire bargaining units and therefore suffered actuarial harm as a result of Kraftco's compliance with the side agreement rather than its collective bargaining agreements (A-26).

A panel of the Court of Appeals for the Sixth Circuit affirmed, 2-1. (App. B). In a concurring opinion, Judge DeMascio wrote "separately only to emphasize the overwhelming evidence upon which the district court made its findings of fact." Indeed, summarizing testimony adduced at the trial, Judge DeMascio stated that "the district court could not have reached any other conclusion but that the letter agreement was never put before the membership for ratification." (A-32). While Judge DeMascio did not agree with the trial court's application of Section 302(c)(5) to the facts of the case, he believed that the Court's conclusion that the side letter was invalid was "amply supported by the remainder of [its] factual findings and legal conclusions." (A-32).

Kraftco filed a Petition for Rehearing *en banc*. A majority of judges did not vote for review and by order entered February 10, 1986, the original panel reaffirmed its decision. (App. E). On February 19, 1986, the appeal was restored to the active docket by an order indicating that a majority of the court now favored an *en banc* hearing. (App. F). On September 2, 1986, the Sixth Circuit *en banc* unanimously reversed. Two concurring opinions took issue with important aspects of the majority's reasoning, Judge Engel objecting to the reliance placed on testimony which the district court had discredited; Judge Guy objecting to the majority's treatment of 302(c)(5). (A 69-70).

After reciting the "clearly erroneous" standard for appellate review of a district court's factual findings articulated by this Court in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), the Court of Appeals proceeded to reweigh the evidence and make its own findings of fact, holding that the side letter agreement had been ratified and that it "clarified" the pension provision of all collective bargaining agreements from 1969 to 1978.[4], (A-68). Alternatively, the Court held that even if the side letter had not been ratified, Kraftco had the right to rely on Don Vestal's apparent authority to execute agreements on behalf of Local 327's membership. (A 62-67). The Court held that this authority could be inferred from "custom and practice" since nine other side agreements had been executed without ratification.[5]

The Court overlooked the Fund's independent obligations to Kraftco's employees under ERISA. Moreover, the Court noted but did not address the District Court's concern

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[4] The Court of Appeals' conclusion that the side agreement had been ratified was based solely on the testimony of James Dreaden, a former member of the union bargaining team who had subsequently joined Kraftco's management. The District Court, before whom Dreaden appeared as a witness, discounted this testimony entirely. Even if Dreaden's testimony was credible, it could only have supported a finding that the side letter was ratified by *milk plant employees* in connection with the 1969-1971 collective bargaining agreement. It was repeatedly stated that the letter was never brought up again during subsequent negotiations.

[5] The Court disregarded the fact that these unratified letter agreements for the most part dealt with problems concerning individual employees and were also executed *after* 1969. More importantly, the Court disregarded the fact that *every* signatory to the side letter was aware of its genesis as a response to the IBT's insistence that the 36-month rule be deleted from the collective bargaining agreement.

that funds must be able to rely on collective bargaining agreements and are placed in an untenable position if secret arrangements are enforced which they have no part in negotiating and of whose existence they cannot know. Misperceiving the range of Congressional concerns underlying passage of the LMRA, the Court held that the side agreement did not violate 302(c)(5) because it had not been procured by a biibe. Without explaining how Kraftco's employees could have adequate notice of their entitlement to benefits if the terms of successive collective bargaining agreements were deemed "clarified" by a side letter that was never disclosed after 1969, the Court held, alternatively, that 302(c)(5) was satisfied because the agreement was in "writing" and was arguably "more detailed" than the pension provision of the collective bargaining agreement.[6]

The Sixth Circuit's opinion is an open invitation to employers and to unions to execute side agreements in what they may perceive to be the "best interests of the bargaining unit" (if not for less noble reasons) but without regard for the "best interests" of pension funds and the statutory obligations of trustees to a larger constituency of participants and beneficiaries. While such agreements are not *per se* unlawful, pension funds are entitled to disclosure and the right to reject a nonconforming contract. Moreover, where, as here, a nonconforming side agreement coexists with a collective bargaining agreement that is acceptable on its face, national pension law and policy requires enforcement of the collective bargaining agreement without regard to an undisclosed understanding that reduces the employer's obligations to the detriment of the Fund's entire pool.

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[6] The court believed that the term "36 months" was a clearer indicium of eligibility for pension contributions than the term "regular employee" although "36 months" appears nowhere in the collective bargaining agreement while the term "regular" employee is used in various provisions in order to distinguish employees who had achieved seniority from employees who had been hired on an "extra," "temporary" or "emergency" basis. The term "regular employee" to denote employees who have completed their probationary period is commonly used and well known to those who negotiate collective bargaining agreements. *Watson Brothers Transportation Co. v. Jaffa*, 143 F.2d 340 (8th Cir. 1944). *Teamsters Local 348 Health and Welfare Fund v. Kohn Beverage Co.*, 749 F.2d 315 (6th Cir. 1984).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision should be reviewed because it is inconsistent with national pension policy and the goals of ERISA; it is inconsistent with the notice requirement underlying Section 302(c)(5) of the LMRA; it conflicts with the reasoning of numerous decisions of this Court and other Courts of Appeals; and completely fails to take into account the status of pension fund trustees as statutory obligors, subjecting them without their consent to the secret side arrangements of employers and unions

1. Enforcement of undisclosed side agreements is inimical to national pension policy and the goals of ERISA; the Sixth Circuit's decision therefore conflicts in principle with decisions of this Court and other Courts of Appeals

a. The Court of Appeals gave no weight to national pension policy

In enacting ERISA in 1974 and MPPAA in 1980, Congress sought to give enhanced protection to American workers and to prevent the great personal tragedies that arose when employees retired only to discover that the benefits they had anticipated and for which they had worked could not be paid due to plan underfunding. Recognizing the legitimacy of these remedial statutes in the interests of interstate commerce itself, this Court has consistently demonstrated a protective attitude toward employee benefit plans in the interests of their participants and beneficiaries. *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980); *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981); *Jim McNeff v. Todd*, 461 U.S. 260 (1983); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport*, 105 S. Ct. 2833 (1985); *Connolly v. PBGC*, 106 S. Ct. 1018 (1986). The existence of a strong federal interest in the financial integrity of employee benefit funds need not be justified or further belabored here.

Holding that a secret side agreement was binding on the Trustees of the Pension Fund, even though that agreement substantially reduced the employer's obligations under its collective bargaining agreements without the knowledge and

consent of the Fund, the Sixth Circuit's decision has directly threatened the financial soundness of Central States, thereby adversely affecting the interests of its participants and beneficiaries as well as those of other contributing employers.[7] As a rule of law holding that employer-union side agreements are enforceable without disclosure to affected funds, the Sixth Circuit's opinion potentially threatens the fiscal integrity of all multiemployer plans established through collective bargaining.

From the perspective of national pension policy, the Court of Appeals addressed the wrong questions and overlooked the most relevant considerations. By focusing solely upon principles of contract formation (ratification of the side letter by the union membership) and agency (the employer's reliance on the apparent authority of a union representative to execute a binding agreement without ratification), the Court sought only to grant the employer the benefit of its bargain with the union. However, it lost sight of the independent existence of the Pension Fund and the comprehensive rights and obligations of the Fund's Trustees under ERISA, rights and obligations that affect a far larger and different constituency than that of the bargaining units represented by Local 327.

b. The decision creates a pernicious and improper merger of the identities of ERISA pension trusts and unions

The Court of Appeals' first and fundamental error was to treat the Pension Fund and the union as one and the same.[8] Indeed, it is difficult to discern from reading the opinion that the appeal arose from a collection action initiated by the Pension Fund and that the Pension Fund, not the union, was the real party in interest. In so doing, the Sixth Circuit

[7] Kraftco's practice of omitting 36 months of contributions on each covered employee has contributed to plan underfunding and increased the Fund's unfunded vested benefits liability. As a result, any employer who withdraws from the Pension Fund will be assessed correspondingly greater withdrawal liability under MPPAA.

it stated: "Section 302(a) makes unlawful an agreement by an employer to pay money to a union representative (the trust fund)." (A-61). Similarly, it stated: "Accordingly, it is clear from the testimony of Kraftco employees and the conduct of the union and fund that none of the parties considered ratification a prerequisite to the validity of the side letter agreement." (A-68).

departed from numerous decisions of this Court which have emphasized, in various contexts, that pension funds and unions are separate and distinct, serve different constituencies, have different objectives, and deserve different protections.

In *Lewis v. Benedict Coal Co.*, 361 U.S. 459 (1960), this Court recognized even prior to ERISA that pension fund trustees were specially situated third-party beneficiaries of collective bargaining agreements; it therefore held that substantive defenses (specifically, set-off) which could be raised by an employer against a union could not be raised against trustees in an action to collect delinquent contributions. *Lewis v. Benedict* was reaffirmed in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), and its rationale extended to the procedural defense of arbitration. Underlying both decisions was the recognition that employer contributions are fund assets not union assets; that these contributions must inure to the benefit of all of the participants and beneficiaries of the fund; and that individual relationships between employers and unions cannot derogate from the collective interest of all contributing employers as well as the entire participant pool in having all contributions paid promptly as promised.

In *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), this Court held that a union could, without violating 8(b)(1)(B) of the LMRA, strike to compel an employer to make pension contributions to a national trust fund although the trustees of that fund had already been selected. In so ruling, the Court made it unambiguously clear that fund trustees, both under the LMRA and ERISA, are not the bargaining representatives of the employer or union groups that appoint them, that collective bargaining and trust administration are fundamentally different, and that trustees owe undivided loyalty solely to fund participants and beneficiaries.

In *Central States v. Central Transport*, 105 S. Ct. 2833 (1985), the Court held that the Central States Trustees had the right, pursuant to the Fund Trust Agreements, to audit complete payroll records of contributing employers in order to verify the accuracy of reporting and that this contractual right was consistent with the Trustees' rights and obligations under ERISA. Reversing a decision of the Sixth Circuit,

which had limited the Funds' audit rights to the records of "concededly covered employees," this Court rejected the proposition that the Trustees could rely on the union to police the employer's reporting: "The notion that federal policy favors union enforcement of an employer's collectively-bargained obligation to a benefit plan, to the exclusion of enforcement by the plan's trustees, simply did not survive last Term's decision in *Schneider Moving & Storage Co. v. Robbins* . . ." (p. 2843). Elaborating, Justice Marshall stated as follows:

> A trustee's duty extends to all participants and beneficiaries of a multiemployer plan, while a local union's duty is confined to current employees employed in the bargaining unit in which it has representational rights. The breadth of the trustee's duty may result in a very different view of the special situations that may exist in any single unit, and, as we recognized in *Schneider*, a *union's arrangements with a particular employer might compromise the broader interests of the plan as a whole*. . . .

Id., emphasis added. Quoting from *Amax Coal*, the Court stressed that "'[t]he atmosphere in which employee benefit trust fund fiduciaries operate, as mandated by [29 U.S.C. § 186(c)(5) and] ERISA, is wholly inconsistent with the process of compromise and economic pressure [that characterizes collective bargaining].'" *Id.* at 2844.

Consistent with these decisions, a side agreement compromising obligations set forth in a collective bargaining agreement cannot be sustained solely on the basis of bargaining unit ratification and/or the union's apparent authority. As independent entities, whose trustees have independent statutory rights and obligations, pension funds are entitled to disclosure not only of collective bargaining agreements but of any modifications and/or clarifications which qualify the employer's contribution obligations and may therefore "create unfunded liabilities chargeable under the plan." *Central Transport, supra* at 2938. Absent disclosure and an opportunity to bring about conformance, the trustees should be entitled to enforce the collective bargaining agreement without regard to any side agreements that may exist. The Court of Appeals failed to examine the financial impact of Kraftco's undisclosed side agreement on the Pension Fund.

c. An undisclosed and nonconforming side agreement should not be binding on fund trustees merely because it was executed "in the best interests of the bargaining unit" and does not "harm" the employer's own employees

The Sixth Circuit was perhaps persuaded to enforce the side agreement because it ostensibly served the legitimate goal of maximizing wages; moreover, Kraftco had agreed to "make whole" any of its own employees who applied for pensions by remitting the three years of missing contributions at that time. Consistent with various decisions of this Court, these factual circumstances were not sufficient to validate the side agreement and to make it binding on fund trustees in the context of an ERISA collection action.

In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), *Schneider Moving & Storage Co. v. Robbins*, *supra*, and *Central States v. Central Transport*, *supra*, this Court recognized that unions and fund trustees may be guided by potentially conflicting interests. Whereas a primary and legitimate union objective is to maximize wages or the overall compensation of the bargaining unit as a whole, *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), the trustees' sole concern must be the enforcement of negotiated pension commitments on behalf not only of active members of the bargaining unit but of retirees who stand outside of the bargaining unit, who are not protected by the union's duty of fair representation, and who therefore rely on the trustees to protect their statutory and contractual entitlements to retirement income. A fund's entire constituency, particularly its retired participants and their beneficiaries, cannot be adequately protected unless trustees can rely upon and enforce the terms of collective bargaining agreements.

An undisclosed side agreement that reduces the employer's pension obligations and adversely affects the actuarial soundness of the fund does not merit enforcement against the Fund simply because the alleged purpose of the agreement was to "maximize wages." From the perspective of national pension policy, which is addressed *solely* to protecting retirement income, there is no difference between a side agreement that was executed "in the best interests of the bargaining unit," although at the cost of reduced pension contributions, and a side agreement that is no more

than a "sweetheart contract" benefiting no one but its signatories. Consistent with the policies underlying ERISA and MPPAA as well as the decisions of this Court, pension funds cannot be subjected to secret side agreements on the grounds that these agreements are legitimate products of collective bargaining.[9]

Nor does a side agreement like Kraftco's deserve special treatment because the company agreed to "make whole" its own employees by remitting past due contributions for any individual who was eligible and applied for a pension. First, an agreement on behalf of individual employees does not "make whole" the Pension Fund which has lost three years of contributions on behalf of two entire bargaining units over a period of nine years. If every employer could make such an agreement, the Fund's actuarial assumptions would crumble. Second, the agreement is purely voluntary and depends upon Kraftco's continued existence. Third, the agreement deprives the Trustees of their right "to gain immediate use of trust assets for the benefit of the trust." *Central States v. Central Transport, supra* at 2845. As this Court noted: "Congress sought to create a pension system in which '[a]ll current accruals of benefits based on current service . . . [would] be paid for immediately." *Id.*, citing H.R. Rep. No. 93-533, p. 14 (1973); *U.S. Code Cong. & Ad. News* 1974, p. 4652; 29 U.S.C. § 1082. By deferring the remittance of past due contributions until individual employees apply for pensions, Kraftco has forced the Fund to incur "unfunded liabilities that might eventually prove uncollectible as a result of insolvencies." *Id.* Even worse, an agreement like Kraftco's, if enforced, compels a fund to "extend credit to a party in interest" which is a prohibited transaction under 29 U.S.C. § 1106. The Court of Appeals misperceived the nature of a pooled trust.

d. The Court of Appeals failed to recognize the necessity of disclosure to the Pension Fund, a statutory obligor

Disclosure of all agreements affecting the amount of pension contributions and the identity and number of plan

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[9] It is clear from the union's response to Kraftco's declaratory judgment action that Local 327 regarded the Vestal side letter as a surreptitious, unauthorized, and invalid attempt to circumvent the collective bargaining agreement. In other words, notwithstanding its alleged purpose, it was *not* a legitimate product of collective bargaining.

participants is essential for the effectiveness of various provisions of ERISA, for example: 29 U.S.C. § 1023 (filing of annual reports, including a statement by the Administrator of the number of employees covered by the plan); 29 U.S.C. § 1024 (distribution of summary plan description to all participants and beneficiaries); and 29 U.S.C. § 1025 (furnishing participants with notice of their benefit rights). Under 29 U.S.C. § 1059, contributing employers have an affirmative *duty* to furnish whatever information is necessary to enable a plan administrator to comply with the above disclosure provisions of ERISA. Clearly, collective bargaining agreements and any modifications or clarifications thereof are encompassed within this statutory duty. While not express, the duty of disclosure must also be implied in 29 U.S.C. § 1145 which, read together with ERISA's "prudent man" and "prohibited transaction" rules (29 U.S.C. §§ 1104, 1106), requires trustees to enforce collectively-bargained obligations to the plan.

Pursuant to Kraftco's side agreement, employees who did not complete 36 months of service would not have been reported to the Fund, although they would have become "statutory participants" after one year in accordance with 29 U.S.C. § 1052(a)(1). The Trustees cannot disclose information to participants whose existence is unknown, as this Court observed in *Central States v. Central Transport, supra*. More important, the Trustees could not have availed themselves of ERISA's enforcement mechanisms since the secrecy of the side agreement left them ignorant of Kraftco's deviation from the obligations set forth in the collective bargaining agreements. Finally, the broad audit rights vouchsafed the Trustees by this Court in *Central Transport* would have been unavailing since the Sixth Circuit would have enforced the side agreement instead of the collective bargaining agreement even if it had been discovered by the Fund in the course of an audit. Enforcement of secret side agreements that inhibit the Trustees from fully exercising their fiduciary obligations is inconsistent with the above provisions of ERISA.

The most harmful aspect of the Sixth Circuit's decision is that it fails to recognize the Pension Fund's status as a statutory obligor. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981), this Court noted that "the concepts

of vested rights and nonforfeitable rights are critical to the ERISA scheme." In *Central Transport, supra,* this Court twice stated that the DOL's consistent opinion has been that these rights are a function of hours of service and must be honored without regard to whether or not an employer has made proper contributions (n. 7, p. 2838; n. 20, p. 2845). As noted above, ERISA would confer participant status on Kraftco's covered employees after 1,000 hours of service notwithstanding the 36-month deferral provision of the side agreement. After ten years, these employees would vest although the Fund would have received only seven years of contributions. Upon vesting, each employee would be entitled to at least nine years of benefit accrual. Notwithstanding the Fund's statutory obligation to satisfy these benefits, the Court of Appeals would allow a secret agreement to deprive the Fund of the contributions actuarially determined to be necessary to support these benefits, thus undermining the Fund's actuarial assumptions. In due course, the employees' statutory entitlements would result in a depletion of fund assets to the detriment of all Fund participants.

It should also be noted that 29 U.S.C. § 1052-1054 set forth only *minimum standards* for participation, vesting, and benefit accrual. Many multiemployer plans, including Central States, have more generous standards. Under 29 U.S.C. § 1104(a)(1)(D), trustees have a fiduciary obligation to administer trust plans in accordance with the governing plan documents. Hence, the trustees would have to comply with the plan documents and award benefits in accordance with the plan's eligibility criteria even though a side agreement deprived the Fund of the income upon which the ability to pay such benefits was based. The contractual entitlements of plan participants would therefore deplete fund assets even further.

In granting the Trustees the audit rights requested, this Court recognized that an employer's "failure to report all those who perform bargaining unit work . . . may create unfunded liabilities chargeable to the plan." *Central States v. Central Transport, supra* at 2838. Kraftco's undisclosed and nonconforming side agreement creates the same problems addressed by this Court in *Central Transport*; corre-

spondingly, the Sixth Circuit's enforcement of the side agreement ignores the policy considerations addressed and the conclusions reached in *Central Transport*. By failing to acknowledge the Fund's status as a statutory obligor, the Sixth Circuit's decision permits fund assets to inure to the benefit of an employer in violation of 29 U.S.C. § 1103(c)(1).

e. A rule of law which makes a secret, nonconforming side agreement binding on ERISA trustees is inconsistent with the trustees' right to reject nonconforming contracts to protect the actuarial soundness of the Fund

By requiring a written agreement concerning pension plan contributions, fund trustees are presented with an opportunity to reject a nonconforming contract before participant benefits have accrued. In this respect, the insidious consequences of the Court of Appeals' decision are fully revealed. If a secret agreement is permitted, the trustees are deprived of the opportunity to reject it or to demand conforming corrections. Hence, the Sixth Circuit's decision conflicts with the reasoning of other courts which have held that trustees have the right to determine a fund's minimum participation criteria and to reject collective bargaining agreements which do not conform to these standards and therefore create unfunded liabilities that threaten the fund's actuarial soundness. *Central Hardware Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 770 F.2d 106 (8th Cir. 1985); *Central States, Southeast and Southwest Areas Pension Fund v. Chicago-St. Louis Transport*, 535 F. Supp. 476 (N.D. Ill. 1982), *aff'd*, 720 F.2d 681 (7th Cir. 1983); *Talarico v. United Furniture Workers Pension Fund A*, 479 F. Supp. 1072 (D. Neb. 1979).

National pension policy requires that Kraftco's obligations be enforced pursuant to the terms of the collective bargaining agreement and not in accordance with a secret side agreement which the Trustees did not know existed and which they had no opportunity to reject.

2. A secret side agreement reducing pension contributions required by a collective bargaining agreement has the same effect as a prohibited oral modification of the collective bargaining agreement; its enforcement is therefore inconsistent with the notice requirement of Section 302(c)(5) of the LMRA as construed by various Courts of Appeals

Section 302(c)(5)[10] of the LMRA prohibits employers from paying and funds from accepting contributions except pursuant to detailed written agreements that specify the basis upon which payments will be made and benefits disbursed. A major purpose of the "writing" requirement is to give employees notice of their entitlements so that they can "go to court" to enforce them. 93 Cong. Rec. S 4876 (Senator Taft); 4883 (Senator Ball) (May 8, 1947).

In an effort to deter side agreements between employers and unions which deprive both employees and funds of the notice contemplated by 302(c)(5), courts of appeals have rigidly enforced the "writing" requirement of the statute and have consistently refused to honor oral understandings that qualified or reduced the employer's contribution obligation as set forth in the written collective bargaining agreement. *Lewis v. Owens*, 338 F.2d 740 (6th Cir. 1964, *see* concurring opinion of Phillips, J.); *Lewis v. Seanor Coal Co.*, 382 F.2d 437 (3d Cir. 1967); *Manning v. Wiscombe*, 498 F.2d 1311 (10th Cir. 1974). As the Second Circuit noted in *Moglia v. Geoghegan*, 403 F.2d 110, 116 (2d Cir. 1968), "[a]ny erosion of the strict requirements of this section could provide an unintended loophole for the unscrupulous and could result in a diversion of funds away from the proper parties as had occurred before Section 302 was enacted."

For purposes of the present appeal, *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981), is particularly instructive. Here, fund trustees brought an action to collect delinquent contributions required by the collective bargaining

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[10] The Pension Fund's claim arose in 1969. For periods prior to ERISA's effective date (1969-January 1, 1975), Petitioners' claim is governed by the LMRA. For periods after 1975, the Fund's claim is governed by the LMRA and ERISA. Even if 302(c)(5) is regarded as inapplicable, the ERISA claim would still remain for the period 1975-1978.

agreement. The employer defended that he had only entered into the contract upon certain oral assurances by a union business agent that the contract would not be enforced. The employer testified that the business agent "wanted to protect himself with the union to keep him from getting into trouble and he wanted me to sign a contract. . . ." *Id.* at 1365. He also testified that the business agent visited various construction sites about twenty times during the relevant period and knew that non-union employees were being used. The district court held that the collective bargaining agreement was void by reason of fraud in the inducement. The court of appeals reversed, emphasizing that "federal law [does not permit] oral modifications of agreements already made." The court stated:

> A rule permitting oral modification of written trust arrangements would defeat the elaborate protection Section 302 provides trust beneficiaries. Employees, basing their futures on the promise of an old-age pension provided in a union contract, may discover in later years to their surprise that an oral agreement had eroded the worth of their pension rights. The rule may also tempt local union representatives and employers to enter corrupt bargains since no written record would exist delineating the employer's trust obligations.

Id. at 1366. The court also found that a business agent's knowledge of the employer's contractual violations was not imputable to the trustees since unions are not funds' agents under applicable federal law. *Id.* at 1368. In *Maxwell v. Lucky Construction Co.*, 710 F.2d 1395 (9th Cir. 1983), the court extended the reasoning of *Waggoner v. Dallaire* to a side agreement that was neither "secret" nor "unfair" to the employee affected, although it was not disclosed to the funds involved.

In *Manning v. Wiscombe*, 498 F.2d 1311, 1313 (10th Cir. 1974), the Tenth Circuit refused to honor the "custom and practice" of the parties to a collective bargaining agreement and enforced the contract as written rather than as applied on a "union members only" basis. Relying on *Lewis v. Benedict, supra*, the court stated: "The primary parties cannot modify by subsequent conduct the express terms of an

agreement without the consent of a third-party beneficiary whose rights have vested."

Finding that the 1969 side letter was not disclosed either to the union membership or to the Fund, the District Court, consistent with the above cases, treated it as an oral modification of the collective bargaining agreement. In contrast, focusing solely on the general anti-racketeering purpose of Section 302, the Court of Appeals held that 302(c)(5) was not applicable to the facts because the side agreement had not been procured by an illegal payment to Vestal. Alternatively, the Court found that even if 302(c)(5) was applicable, the letter satisfied its "writing" requirement.

The Court of Appeals erred for two reasons. First, neither legislative history nor case law supports the view that undisclosed side agreements reducing an employer's contribution obligations are valid under 302(c)(5) as long as they are not secured by a bribe. Second, the Court completely ignored the "notice" purpose of 302(c)(5). While the Court chose to credit testimony that the side letter was disclosed to the milk plant employees in connection with the 1969-1971 collective bargaining agreement, there was *no* testimony that the letter was disclosed to any employees ever again. Indeed, it only came to the attention of the union when a long-standing Kraftco employee inquired about his pension only to discover that three years of contributions were missing. Significantly, this employee belonged to the milk plant bargaining unit which supposedly ratified the 36-month deferral!

In this regard, it should be emphasized that the side letter does not state that it is intended to "clarify" all future collective bargaining agreements. The letter refers only to the then current labor agreement (singular). Thus, Kraftco's assertion that the 36-month deferral period was intended to last in perpetuity can only be based on an oral understanding with Don Vestal. Except as applied to the 1969-1971 contract covering milk plant employees, the 36-month deferral agreement is therefore no different from the usual type of oral modification routinely denied enforcement by most federal courts.

Part of the Fund's claim involves years prior to ERISA. But for ERISA, and unless a particular plan provided otherwise, employees affected by a side agreement of the type at bar would have had to accept a lesser benefit upon retirement or would have had to work an additional three years to make up the deficiency caused by the 36-month contribution omission. It is difficult to see how a side agreement like Kraftco's would provide these employees with notice sufficient to permit them to "go to court" to enforce their entitlements as Congress intended. And what notice did the Pension Fund have of this secret understanding? The Court of Appeals did not address these significant practical problems. Nor did it reflect upon why a purported "clarification" of ambiguous contract language was never put into subsequently drafted collective bargaining agreements so that the parties' intention to withhold contributions for 36 months would, in fact, be "clear" to all readers. Moreover, the Court did not reconcile Kraftco's testimony that the side letter was a "clarification" of its obligations under the collective bargaining agreement with the company's immediate willingness to pay in accordance with purportedly "ambiguous" contract terms as soon as the union made a demand upon discovering the side agreement in 1978.

In sum, the Sixth Circuit's treatment of 302(c)(5) has resulted in an extremely harmful and dangerous precedent for it invites employers and unions to enter into collective bargaining agreements as a facade while couching their real agreement in a quite different and undisclosed document. Notwithstanding such an agreement reduces contributions on which both employees and pension funds rely, the contract will be enforceable against the trustees' as long as it is in writing even if it never sees the light of day after the moment it is signed. Federal pension law does not justify such a result.

CONCLUSION

The Court of Appeals' decision has placed the trustees of multiemployer pension funds in an untenable position: they must provide credits and benefits based on hours of service to all employees covered by collective bargaining agreements but cannot rely on these agreements as a true measure of the employer's contribution obligations; they must identify all plan participants and disclose information to them but are subject to enforceable side agreements which conceal the existence of such persons; they may audit employer records to verify the accuracy of reporting but are bound by side agreements reducing the employer's contribution obligations so long as the agreement is in writing; they must vigorously represent retirees but are subject to side agreements designed to promote the interests only of active members of the bargaining unit; they are separate and distinct from unions but are bound by a union official's apparent authority.

For all of the reasons set forth herein, this Court should grant the Petition and declare that undisclosed side agreements reducing an employer's obligations under written collective bargaining agreements are unenforceable because they are inimical to the purposes and policies underlying ERISA and the LMRA and obstruct the trustees' ability to perform their fiduciary obligations to all of a plan's participants and beneficiaries.

Respectfully submitted,
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND DANIEL J. SHANNON,
Petitioners,

v.

KRAFTCO, INC., d/b/a
Sealtest Foods Division,
Respondent.

APPENDIX

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APPENDIX A

Opinion of the District Court

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and Daniel J. Shannon

v.

KRAFTCO, INC., d/b/a Sealtest Foods Division.

KRAFT, INC.

v.

LOCAL UNION 327, TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS.

Nos. 78-3135, 79-3064.

United States District Court,
M.D. Tennessee,
Nashville Division.

May 9, 1984.

MEMORANDUM

JOHN T. NIXON, District Judge.

The above-styled actions raise issues of federal labor law. Civil Action No. 78-3135 was filed April 20, 1978 by Central States Southeast and Southwest Areas Pension Fund and its trustees (Fund) on behalf of the Fund's participants and beneficiaries seeking the payment of allegedly delinquent pension contributions from an employer, Kraftco, Inc., d/b/a Sealtest Foods Division (Kraftco). Civil Action No. 79-3064 was filed on February 6, 1979 by Kraftco against Local Union 327, Teamsters, Chauffeurs, Helpers and Taxicab Drivers (Union) under the declaratory judgment provisions of 28 U.S.C. §§ 2201 and 2202 seeking a declaration of its rights and responsibilities for pension contributions under the terms of the collective bargaining

agreements with the Union. Subsequently both actions were consolidated. Jurisdiction is based upon diversity of citizenship, 28 U.S.C. § 1332, for enforcement of trust agreements creating the Fund and to which Kraftco is a party; the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, for enforcement of rights conferred by 29 U.S.C. § 1145; and the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, for enforcement of collective bargaining agreements entered into between Kraftco and the Union.

Previously, the parties filed cross-motions for summary judgment. The Court concluded that the provisions of ERISA did not apply to the Fund's claims against Kraftco arising prior to January 1, 1975, and that the Fund's claims under the LMRA arising prior to April 20, 1972 were time-barred by TENN. CODE ANN. § 28-3-109(3). The cross-motions did not raise claims under diversity of citizenship. The motions in case No. 78-3135 were denied and the Union's motion for summary judgment in case No. 79-3064 was granted and the action dismissed. *Central States v. Kraftco,* 527 F.Supp. 420 (M.D.Tenn.1981).

Kraftco appealed the dismissal. That appeal was pending on March 15, 1982 when Civil Action No. 78-3135 came on for trial without benefit of a jury. During the trial, the Court reserved both motions for dismissal under FED.R.CIV.P. 41(b) as well as a motion in limine made on behalf of Kraftco.

On June 23, 1982, subsequent to the bench trial, the Court of Appeals reversed the judgment of this Court dismissing the Union from Civil Action No. 79-3064 and remanded the matter for further proceedings not inconsistent with its opinion. *Kraftco, Inc. v. Local Union 327, Teamsters,* 683 F.2d 131 (6th Cir.1982). Thereafter, Kraftco and the Union stipulated that another hearing would adduce no further evidence relating to issues in Case No. 79-3064 and that the issues therein could be submitted for disposi-

tion on the basis of the record made on March 15, 1982. Having considered all of the evidence presented, and briefs and argument of counsel, the Court makes the following findings of fact and conclusions of law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

FINDINGS OF FACT

Plaintiff Fund is a common law trust established as an employee benefit plan as a result of negotiations between various employers, employer groups and certain Teamster local unions and conferences. It has been in existence since approximately 1957. The Fund is an employee benefit plan within the meaning of ERISA, 29 U.S.C. §§ 1001 *et seq.* and the LMRA, 29 U.S.C. §§ 141 *et seq.*

Defendant Kraftco is an employer operating a dairy production facility in Nashville, Tennessee. Defendant Union is a labor organization that has been engaged in collective bargaining with Kraftco for many years prior to this controversy. Neither Kraftco nor the Union is a signatory to the trust agreements creating the Fund. However, through collective bargaining agreements between Kraftco and the Union dating from 1966, Kraftco and the Union have agreed to participate in the Fund. The trust agreements require Kraftco to pay the Fund a specified sum per week on behalf of certain employees at an ice cream plant and a milk plant operated by Kraftco in Nashville, Tennessee.

Each collective bargaining agreement in effect between the Union and Kraftco from 1966 through 1980 contains the following paragraph relating to pension participation:

> The Employer recognizes the authority of the acting trustees and their successors, appointed by the Employer and the Union, to administer the above named Pension funds in accordance with the Trust Agreement under which such trustees have been appointed and are acting and the rules and regulations adopted by them; but Employer's obligation shall be and hereby is limited to the foregoing weekly contributions.

Prior to 1971, Kraftco and the Union negotiated contracts for three separate bargaining units: milk plant employees, ice cream production employees, and ice cream route sales employees. In 1971 the milk plant and ice cream production employees were combined into one bargaining unit. There was a higher turnover of employees in the milk plant and ice cream production operations than among the route salesmen. This resulted in a significant difference in the pension provisions of the collective bargaining agreements.

The collective bargaining agreements in effect between 1965 and November of 1968 for milk plant employees and ice cream production employees required weekly payments to the Fund from Kraftco on behalf of all employees with thirty-six months of service. The collective agreement covering the ice cream route salesmen required weekly payments to the Fund on behalf of all salesmen with ninety days of service. Thus, workers in the operation where a high rate of turnover existed, were not covered by the pension benefits until they were on the payroll for three years, whereas route salesmen, whose employment was more stable, were covered after being on the job ninety days. The 1966 collective bargaining agreements were the first for milk plant and ice cream production employees that specifically provided that pension contributions would not be paid by Kraftco on behalf of employees having less than thirty-six months seniority in the bargaining unit.

In December, 1968, Kraftco and the Union entered into a successive collective bargaining agreement for ice cream route salesmen that expired in 1971. This collective bargaining agreement carried forward the provision that weekly payments be made to the Fund by Kraftco for all salesmen with ninety days of service. During 1969, Kraftco and the Union entered into successive collective bargaining ageements for ice cream plant production employees and milk plant employees.

The by-laws of Local 327 provide that whenever a collective bargaining agreement is about to be negotiated, the president calls a meeting to determine and authorize the bargaining demands. These demands are then submitted to the employer. After the contract is executed, the agreement is submitted to the members at another meeting of the Union for vote.

Negotiations for the milk plant employees began first. Kraftco was represented by T.N. Rose, its general manager, and by Donald H. Spencer, its personnel manager. The Union was represented by Don Vestal, its president and business manager, and members of the Union negotiating committee. A representative of the Teamsters International Union was present at and participated in one session of the negotiations, even though local collective bargaining agreements do not need the International Union's approval to become effective. Due to the insistence of the International Union's representative, the thirty-six month provision was deleted from the new contract. At the bargaining table both sides agreed to the deletion of the thirty-six month provision. The new contract that was executed by both parties provided that Kraftco would make pension contributions on behalf of employees with thirty or ninety days of service, depending upon job classification. In that the contract had to be ratified by the membership of the Union, the contract was not binding at this point. The contract was executed and duly ratified on June 27, 1969.

On June 26, 1969, Rose and Spencer for Kraftco, and Vestal for the Union, met to discuss circumventing the language of the new contract that had been insisted upon by the International Union's representative. No member of the Union negotiating committee was present. The following "side letter" agreement resulted from that meeting:

SEALTEST FOODS
Division of National Dairy Products Corporation
P.O. Box 1179, 1401 Church Street, Nashville, Tennessee, AL 5-6431

June 26, 1969

Mr. Don Vestal
President & Business Manager
Local Union 327
Teamster, Chauffeurs, Helpers & Taxi Cab Drivers
1006 Russell Street
Nashville, Tennessee

Dear Mr. Vestal:

As per our conversation of June 26, 1969, and our agreement of such time, Sealtest Foods will continue to commence regular pension payments on our employees when such employees have been in our employ for a period of thirty-six (36) months. Said pension payments shall then continue as stipulated in our present labor agreement.

If you concur in this agreement, please sign one copy and return to us.

We realize this may require some possible discussion and adjustment for some specific individuals during the life of our labor agreement.

Sincerely yours,
SEALTEST FOODS
/s/ T. H. Rose
T. H. Rose

/s/ Don Vestal
Don Vestal, Pres. & Business Mgr.
June 27, 1969
Date
/s/ D. H. Spencer

Although the contract executed on June 27, 1969 became effective after Union ratification, the side letter was not presented to the Union membership for ratification at that time or any subsequent time.

In the fall of 1969, Kraftco and the Union began negotiating a new collective bargaining agreement for ice cream plant employees. The new bargaining agreement for that unit also deleted the thirty-six month requirement and replaced it with the provision that Kraftco would make pension contributions to the Fund on behalf of employees with thirty or ninety days service according to job classification. After this agreement was executed and took effect, Kraftco was required to make pension contributions on behalf of all employees represented by the Union who had thirty or ninety days of service, dependent upon job classification. Again, the side letter was not presented to the Union membership for ratification.

Nonetheless, contributions to the Fund on behalf of the employees in the milk plant and ice cream plant were made in accordance with the terms of the side letter rather than under the terms of the collective bargaining agreement. Succeeding collective bargaining agreements contained the "thirty or ninety days of service" provision, but Kraftco continued making contributions to the Fund on behalf of the ice cream plant employees and milk plant employees in accordance with the side letter. Kraftco took the position that the letter modified all of these contracts. Spencer considered the letter of infinite duration and Rose considered the letter in effect "until it changed." Not until this controversy arose in 1978 did Kraftco begin to make contributions for milk plant and ice cream plant employees as required by the collective bargaining agreements, rather than in accordance with the terms of the side letter.

Side letters are not unknown to the labor-management relations of Kraftco and the Union. Examples of other letters were submitted into evidence. Some dealt with such

routine matters as the re-employment of a former employee, leave of absence of an employee or the conditional transfer of an employee from a union line job to a non-union supervisory position. A side letter that appears to have made changes in the underlying contract without ratification was dated November 8, 1966. It reads as follows:

Nashville, Tennessee
November 8, 1966

Mr. T. H. Rose
Sealtest Foods
1401 Church Street
Nashville, Tennessee

Dear Mr. Rose:

Listed below are changes in our present contract which have been agreed to by both the Union and Sealtest Foods:

ARTICLE XXIII — SENIORITY

The last sentence of both Section A and Section B shall be changed to read as follows: "After an employee has bid on a route and been awarded such route, or a new employee has been assigned a route, such employee cannot bid on another route for a year regardless of how long he serves the new route awarded him."

It is further agreed in Article XXIII that at the end of two weeks, following the assignment of a route to a successful bidder, that said successful bidder shall be awarded such route to serve or shall begin receiving compensation based on said route.

ARTICLE XXIV — COMPENSATION

Section B. Retail Driver-Salesmen shall be changed to read as follows: "Retail driver-salesmen shall receive fifty dollars ($50.00) per month as base pay, plus fifteen and one-fourth percent (15¼%) after January 1, 1966, and fifteen and

one-half (15½%) during 1967, and fifteen and three fourths percent (15¾%) during 1968, on all collections and cash retail sales from their respective routes, except butter, eggs and ice cream sales. For butter sales retail driver-salesmen shall receive two cents (2¢) per pound, on all retail sales of butter and one cent (1¢) per lb. on all cash and credit wholesale sales of butter. Eggs and ice cream sales as to which driver-salesmen shall receive ten percent (10%) on all retail sales of eggs and ice cream products. Retail driver-salesmen, on all wholesale sales, other than butter, eggs and ice cream products, shall receive seven and one-half percent (7½%)."

ARTICLE XXIV — Section D — shall be changed by adding the following sentence to the last paragraph in said section: "The rate of pay for pudding makers shall be at the same rate of pay as cheese makers and the rate of pay for pudding filler shall be at the same rate of pay as cheese filler."

Very truly yours,
/s/ James R. Craighead
Vice President
For the Union

/s/ D. H. Spencer
For the Company

In 1971, Don Vestal was ousted from office of president and business manager on the basis of charges of corruption and financial malpractice. A trusteeship was established. Mr. W.C. Smith was appointed trustee and he in turn employed Billy Burrows as business agent for the Union. Mr. Burrows immediately became the Union's spokesman in negotiating agreements with Kraftco. In 1974, Rose was replaced as general manager by Royce E. McClintock, who thereafter participated in all negotiations with the Union. Shortly thereafter, in 1974 or 1975, Spencer informed McClintock of the side letter agreement. However, after the ouster of Vestal

in 1971 until this controversy arose in 1978, no representative of Kraftco informed the new Union leadership of the side letter.

In late 1977 or early 1978, a milk plant employee learned that contributions to the Fund on his behalf had not begun until he had completed thirty-six months of service. The employee reported this information to Burrows, who in turn learned that the Kraftco payroll clerks were under instructions to begin making contributions to the Fund on behalf of the milk plant workers only after they had completed thirty-six months of service.

Subsequently, Kraftco agreed to make pension contributions on behalf of all employees with thirty or ninety days of service according to job classification. It is not clear from the record whether this occurred before or after the execution of another milk plant collective bargaining agreement. The question then arose as to whether Kraftco would make past due contributions based on the collective bargaining agreement language from 1969 to 1978. At this time, Kraftco officially informed the new Union leadership of the 1969 side letter.

In due course the Union informed the Fund about the controversy. During the entire period in question, Kraftco provided monthly reports to the Union and the Fund detailing on whose behalf pension contributions were being made. Neither the Union nor the Fund had audited these reports to determine if contributions on behalf of those with less than thirty-six months of service were being made. The Fund, which receives monthly contributions from 15,000 employers, did not have copies of the collective bargaining agreements. Moreover, the remittance forms used by Kraftco in submitting contributions to the Fund do not provide for service of employment date information.

The Fund was created under the law of Illinois, and at all times relevant in this case, the relevant trust agreement

plans provided that "[a]ll questions or controversies, of whatsoever character . . . whether as to . . . any writing . . . instruments or accounts . . . shall be submitted to the Board of Trustees for decision, and the decision .. . if made in good faith, shall be binding on all persons dealing with the Trust Fund." Article V, § 2, Pre-Trial Order Exhibits 1-4. Within two months after the Fund was informed of the controversy, its Board of Trustees instituted Civil Action No. 78-3135 to collect the allegedly past due pension contributions.

Before trial, the Trustees, pursuant to the mandate of the Trustee Agreement, resolved the controversy by concluding that the side letter "probably" does not have any force, weight or effect upon pension contributions required in the collective bargaining agreement entered into in 1969 for Kraftco milk plant employees. The trustees reasoned that neither Vestal nor any other person had been authorized by the Trust Agreement to act as agent for the Fund and reduce contributions required by the co'lective bargaining agreements. However, all questions concerning application of the side letter were specifically referred for resolution in the instant case.

Kraftco has tendered contributions to the Fund on behalf of employees it considers to have been affected by the thirty-six month language of the side letter. It is the position of Kraftco that this is consistent with the "make whole" provision of the side letter which reads as follows: "We realize this may require some possible discussion and adjustment for some specific individuals during the life of our labor agreement."

During the pendency of this action two Kraftco employees, George Craft and Fred Howell, applied for benefits. Each had the requisite number of years of service under the terms of the Trust Agreement and the collective bargaining agreements to be eligible for retirement benefits. However,

because of the thirty-six month provision of the side letter, contributions were not made to the Fund on their behalf until they had been employed for three years. The Fund credited both employees with an additional thirty-six months and Kraftco tendered to the Fund contributions on behalf of each for the thirty-six month period pursuant to the "make whole" provision of the side letter. On June 7, 1979, Kraftco tendered contributions on behalf of Craft. The Fund returned the tender. On May 20, 1981, Kraftco tendered contributions on behalf of employee Howell. On this occasion, the Fund accepted the tender for the Kraftco account with an interest assessment.

As expected, the Fund and Kraftco disagree over whether Kraftco owes delinquent trust fund contributions under the collective bargaining agreements. Kraftco takes the position that none of its employees has been harmed by the use of the side letter and that all the Fund may lose are windfall contributions that will never be paid to beneficiaries. The Fund, on the other hand, claims that if it grants thirty-six months of contribution credit to all persons hired by Kraftco between 1969 and 1978 who apply for pension benefits, then the corpus of the Fund will be reduced. Such reduction, according to the Fund, will endanger the right of all persons to retirement benefits because the actuarial soundness of the trust fund requires that benefits not be received by persons for whom the proper contributions have not been paid.

The question before the Court, therefore, is what effect does the side letter have on the collective bargaining agreements between Kraftco and the Union. This broad question involves certain sub-issues: did the side letter have any force or effect; if so, did the side letter modify only the 1969 contract between the Union and Kraftco on behalf of the milk plant employees or did the side letter modify all of the collective bargaining agreements between 1969 and 1978; if

the side letter was invalid, did Kraftco, nonetheless, properly rely upon it; if the side letter was invalid, is the Fund entitled to the amount for which it has sued or would that be a windfall.

CONCLUSIONS OF LAW

Although comprehensive congressional legislation exists in the field of labor law, this case illustrates the overlap and interrelationship of state and federal labor laws. Resolution of the validity of the side letter agreement between the Union and Kraftco adopted in 1969 involves not only the federal requirements mandated in the LMRA and ERISA, but also involves applicable state law, which governs the trust agreements. The plaintiffs have invoked three distinct legal theories to recover the pension benefits in dispute. Under this Court's diversity jurisdiction, the Court reviews the trustee's decision that the side letter agreement has no effect upon the pension contributions required from Kraftco pursuant to the Trust Agreements under the state law of Illinois, which the agreements specify to be the applicable law. Separately, this Court has jurisdiction under the LMRA and ERISA to determine the rights and liabilities of the parties to make pension contributions and what effect, if any, the side letter agreement has on Kraftco's duty under the collective bargaining agreements to make pension contributions to the Fund. The LMRA and ERISA are made applicable because the Fund is not only a common law trust, and thereby governed by state law, but also because the Fund is an employee benefit plan within the meaning of the LMRA and ERISA. § 3, 29 U.S.C. § 1002(3).[1]

[1] There is no question that the plaintiffs' claim under ERISA and Illinois law are timely. Under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), the plaintiffs seek recovery of past due trust fund contributions and Kraftco's declaratory judgment action against the Union seeks a clarification of rights under the collective bargaining agreements and the trust plan. Under Illinois law, the Fund's action for enforcement of the trust plans is essentially one for recovery of money pursuant to a written

(Footnote 1 continued on next page)

In the present case, the issue of the validity of the side letter agreement, which purports to modify the terms of the collective bargaining agreements in regard to Kraftco's pension contribution requirements, is challenged on the grounds that section 302(c)(5)(B) requires that pension contributions from employers be made pursuant to a written agreement. The plaintiffs maintain that the side letter agreement is an unlawful attempt to abrogate the terms of the collective bargaining agreements and trust agreements. Kraftco counters by asserting that the side letter agreement is effective because it was agreed to by Kraftco and the Union president Don Vestal who had authority to enter such agreements. Moreover, Kraftco contends that because they have relied upon the terms of the side letter agreement, even if it is without any effect, the Union should be estopped from denying the existence of the side letter.

In order to assess the validity of the side letter agreement signed in 1969, this Court is mindful of the temporal scope of the state and federal laws involved. The Court has previously held that the plaintiffs' claims under the LMRA for alleged breaches of the collective bargaining agreements are governed by the general six-year contract statute of lim-

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(Footnote 1 continued from previous page)

agreement. The trust agreements incorporate the collective bargaining agreements, thereby constituting "evidence of indebtedness in writing." In *Jenkins v. Local 705 International Brotherhood of Teamsters*, 713 F.2d 247 (7th Cir.1983), the appeals court applied Illinois law in an action by an employee to obtain benefits and to enforce and clarify rights under an employee pension benefit plan under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). There the appeals court characterized the case as one asserting claims of contract law. *Id.* at 252. Thus, the appropriate statute of limitations was the Illinois contract statute, Ill.Rev.Stat. ch. 110, § 13-206, which provides in pertinent part that "actions on . . . written contracts, or other evidences of indebtedness in writing, shall be commenced within 10 years next after the cause of action accrued. . . ." Here it is apparent that the plaintiffs' commenced this case well within 10 years after the trustees' determination that the side letter agreement was void. *Id.* at 253-54. Thus, the plaintiffs' claims, under ERISA and Illinois state law, are timely asserted.

itations in Tennessee. *Central States v. Kraftco, Inc.*, 527 F.Supp. at 422. Thus, the Fund's remedy under the LMRA is limited to alleged breaches since April 20, 1972. *Id.* The applicability of ERISA is also limited, not by virtue of a statute of limitations, but by Congressional fiat ERISA only applies to pension contribution claims that arise after January 1, 1975. *Id. See also* ERISA § 514(b)(1), 29 U.S.C. § 1144(b)(1) (a cause of action under ERISA is limited to those that accrue after January 1, 1975). The limitations of the LMRA and ERISA have an important effect in this case because the Fund seeks trust fund contributions from the time the side letter agreement was adopted—June, 1969. Neither the LMRA nor ERISA have any applicability on delinquent trust fund contributions from 1969 until April 20, 1972, at which time the requirements of the LMRA are triggered and January 1, 1975 when ERISA is prospectively applicable. Thus, the threshold issue presented in this case is whether from 1969, the time the side letter was signed, until April 20, 1972, the side letter agreement has any validity. Resolution of this issue requires application of the state law of Illinois.

Under the terms of the Trust Agreements, continuing and prompt payments from Kraftco to the Fund according to the collective bargaining agreements with the Union were required. Moreover, the Union and the trustees agreed to submit all controversies to the Fund's trustees for decision, which would be binding if made in good faith. Pursuant to that authority, the Fund's trustees decided that the side letter agreement had no force or effect.

In reviewing the decision of the trustees that Kraftco is obligated to make past due pension contributions according to the collective bargaining agreements rather than the "make whole" provision of the side letter agreement, this Court applies the state law of Illinois pursuant to the Trust

Agreement.[2] Under Illinois law, the scope of review of the trustee's decision is limited to whether the trustees acted arbitrarily or capriciously. *See, e.g., Munts v. Fitzsimmons*, 25 Ill.App.3d 109, 323 N.E.2d 153, 154-55 (1975) (applying arbitrary or capricious standard when reviewing trustees decision in a pension eligibility case). The Illinois arbitrary or capricious standard is consistent with the standard of review of trustees' decisions under the LMRA and ERISA. *Pierce v. Neca-Ibew Welfare Trust Fund*, 488 F.Supp. 559, 564 (E.D.Tenn.), *aff'd*, 620 F.2d 589 (6th Cir. 1980). *Accord Sea Fares Pension Plan v. Sturgis*, 630 F.2d 218, 221 (4th Cir.1980) (Sixth Circuit Judge Phillips explains the arbitrary or capricious standard as not permitting the court to second guess trustees' discretionary judgment); *Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1264 (9th Cir.1979); *Reiherzer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978). As explained by Judge Wilson in *Pierce*, both the LMRA and ERISA require trustees to not only manage the fund as fiduciaries for the participants and beneficiaries, but also to manage the fund in accordance with the documents governing the trust. *Pierce*, 488 F.Supp. at 564.

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[2] In reviewing the trustees' decision under the laws of the state of Illinois, this Court recognizes that the jurisdictional basis for review rests upon 28 U.S.C. § 1332 diversity of citizenship. Pursuant to the doctrine enunciated in *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), this Court must apply the substantive law of Tennessee including Tennessee conflict of laws. *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818, 821 (6th Cir.1977) (citing *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). The general conflicts rule in Tennessee governing contracts is that the law of the place of making governs unless the parties express a contrary intent for another state's law to apply. *Boatland, Inc.*, 558 F.2d at 821. In this case the parties have agreed in the trust agreement that all disputes would be governed under Illinois law. Such an agreement is not contrary to the public policy of Tennessee. *Deaton v. Vise*, 186 Tenn. 364, 372-74, 210 S.W.2d 665, 668-69 (1948). Thus, the trustee's decision that the side letter agreement modifying the obligation of Kraftco to make pension contributions is examined under the laws of the state of Illinois.

Some courts, however, have questioned the applicability of the arbitrary or capricious standard in reviewing trustees' decision when the decision involves a question of law. *See, e.g., Nelson v. Joyce*, 404 F.Supp. 489, 491 (N.D.Ill.1975). Reasoning that when trustees address the eligibility of an applicant for benefits they are in the best position to interpret the trust agreement, the court in *Steinmetz Electrical Contractors Association v. Local Union No. 58*, 517 F.Supp. 428, 434 (E.D.Mich. 1981) suggested that special deference to the trustees' determination is not appropriate when the sole issue addressed by the trustees is a legal question, such as whether a written agreement is adequate to satisfy the LMRA § 302(c)(5), 29 U.S.C. § 186(c)(5)(B). Although the court in *Steinmetz* hesitated to abrogate the arbitrary or capricious standard in reviewing the trustees' decision on a legal question, this Court is persuaded by the reasoning advanced. The Fund trustees in the instant case implicitly recognized this viewpoint when they chose to refer all questions on the validity of the side letter to this Court for resolution. Indeed, the rationality behind deference to the trustees' expertise is removed when the question presented is one arising under the federal labor laws. *See also Local Union No. 5 v. Mahoning & Turumbell*, 541 F.2d 636, 639 (6th Cir. 1976) (concluding that pension fund eligibility standard adopted by trustees could violate LMRA without being arbitrary or capricious). This Court will follow the analysis of the *Steinmetz* court in reviewing the legality of the side letter agreement and not afford the trustees' decision that the side letter is void "any special deference." *Steinmetz*, 517 F.Supp. at 434.

Determining the rights and liabilities of the parties in this case also includes analysis under ERISA, § 306(a), 29 U.S.C. § 1145, which provides as follows:

> Every employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or

> under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

This Court has jurisdiction to enforce § 306(a) under § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), because this is a civil action brought by the trust fund participants to enforce and clarify rights under the trust plan. The clear purpose of § 306(a) is to simplify collection actions brought by trustees. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86-88, 102 S.Ct. 851, 861, 70 L.Ed.2d 833 (1982). Moreover, the requirements of § 306(a) apply to all collection suits pending at the time Congress enacted the provision. *Central States, Southeast & Southwest Areas Pension Fund v. ALCO Express Company*, 522 F.Supp. 919, 925-30 (E.D.Mich.1981). Thus, this case is also controlled by § 306(a) of ERISA.

Although § 306(a) of ERISA is applicable in this case, it requires no additional analysis. There is no question that Kraftco and the Union are bound by the terms of the collective bargaining agreements creating the trust plan and trust fund to which Kraftco is obligated to make contributions. ERISA creates a federal remedy in addition to a state remedy for breach of a contract when an employer fails to make proper pension contributions under the collective bargaining agreement and the trust agreements. *Lewart v. Woodhull Care Center Associates*, 549 F.Supp. 879, 885 (S.D.N.Y.1982); *Central States Southeast & Southwest Areas Pension Fund v. ALCO Express Company*, 522 F.Supp. at 929-30 (E.D.Mich.1981). If the plaintiffs demonstrate that Kraftco's failure to make proper trust fund contributions was without any legal right, then the plaintiffs have proven not only a violation of ERISA, but also shown that the Trustees' decision that the side letter is void was legally correct. The pertinent issue, therefore, is whether the side letter agreement alters the provisions of the written collective bargaining agreements and trust agreements. ERISA

specifically provides that its provisions neither alter, amend, modify nor in any other manner transgress any other federal laws. ERISA § 514(d), 29 U.S.C. § 1144(d). Thus, in enforcing the requirements in § 306(a), this Court need only determine whether the side letter agreement is valid. In making that determination, the requirements of § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) are applicable, given that it is the plaintiffs' position that this section makes the side letter agreement illegal.

The acid test to determine the validity of the side letter agreement is the LMRA requirement that prohibits a labor organization such as trust fund from accepting contributions unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . . " LMRA § 302(c)(5)(B), 29 U.S.C. 186(c)(5)(B). The Congressional purpose for this written agreement provision is to insure that the trust funds are not tampered with or used for illicit purposes. *Alvares v. Erickson*, 514 F.2d 156, 164 (9th Cir.1975). After Congressional investigations verified that union officials were misappropriating funds exacted from employers for employees benefit programs, *Monglia v. Geoghegan*, 403 F.2d 110, 115 (2d Cir.1968), *cert. denied*, 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969); *Seafood Workers Health Fund v. Management Trustees*, 571 F.Supp. 483, 485 (D.Mass.1983), Congress imposed rigid requirements in § 302(c)(5), 29 U.S.C. § 186, including the absolute mandate that all contributions to trust funds be specified in a written agreement. Absent a written agreement, a binding trust cannot exist for employer contributions and the parties making and accepting such contributions violate § 302(c)(5) of the LMRA. Further, the intended beneficiaries have no legal right to benefits derived from union pension funds. *Moglia*, 403 F.2d at 116.

Although the written agreement requirement in § 302(c)(5)(B) is typically satisfied in the form of a collective

bargaining agreement, § 302(c)(5)(B) does not preclude the use of other types of written agreements. *Moglia*, 403 F.2d at 115. Indeed, in *Doyle v. Shortman*, 311 F.Supp. 187, 193-96 (S.D.N.Y.1970) and *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir.1970), the courts held that the trust agreements adopted pursuant to the collective bargaining agreements satisfied the written agreement requirement of § 302(c)(5)(B). As explained in *Doyle*, § 302(c)(5) "nowhere refers to a collective bargaining agreement in haec verba. This is significant, for if Congress — in this statute dealing extensively with collective bargaining — had intended to require a collective bargaining agreement to the exclusion of any other written agreement, canons of construction dictate the conclusion that it would have said so." *Doyle*, 311 F.Supp. at 195. Neither an oral collateral agreement nor an oral modification of a written trust fund agreement is acceptable, *San Pedro Fishermen's Welfare v. Di Bernardo*, 664 F.2d 1344, 1345 (9th Cir.1982); *Gratliff Coal Co. v. Cox*, 152 F.2d 52, 52 n. 1 (6th Cir.1945). Moreover, a written agreement does not exist by implication from the parties minor differences in writings never accepted. *R.V. Cloud Co. v. Western Conference of Teamsters Pension Trust Fund*, 566 F.Supp. 1426, 1428 (N.D.Cal.1983).

The approach of the Ninth Circuit in *Maxwell v. Lucky Construction Company*, 710 F.2d 1395 (9th Cir.1983) is illustrative. In that case, written collective bargaining agreements between the employer, Lucky Construction Company (Lucky), and two local unions required Lucky to make contributions to respective trust funds for its employees. In order to entice a particular employee, John Sampson, to remain with it, Lucky agreed to make greater contributions for Sampson to a different trust fund. Sampson's local union representative orally approved of the arrangement. The district court, relying on *Waggoner v. Dallaire*, 649 F.2d 1362, 1366 (9th Cir.1981) (holding an oral modification of a trust agreement invalid under § 302(c)(5)), found in favor of the trustees of Sampson's previous trust fund and against Lucky

on the grounds that § 302(c)(5) of the LMRA forbids pension payments under an oral modification of a written collective bargaining agreement.

On appeal, Lucky argued that *Waggoner* was inapplicable because none of the policy considerations that were invoked in *Waggoner* were present in Lucky's case. Although agreeing with Lucky on the lack of similar policy considerations, the appeals court in *Lucky* held that neither lack of secrecy, fairness of the oral arrangement, knowledge and participation of the employee or even the employee's and the local union representative's waiver of the protection in § 302(c)(5) negated the absolute requirement that all employer contributions be made pursuant to a written agreement. Any qualification of the requirements embraced in § 302(c)(5) "would render the protective writing requirement less effective by exposing both union and employer to corrupt bargain temptation." *Maxwell*, 710 F.2d at 1398.

The same anti-corruptive concerns were expressed in *Lewis v. Seanor Coal Company*, 382 F.2d 437 (3rd Cir.1967), where the appeals court affirmed the district court's conclusion that an oral side agreement was void under § 302(c)(5)(B). In *Lewis*, the appellate court reasoned that it would be "incomplete to require for the benefit of the employees and to prevent collusive or fraudulent side agreements between employers and union representatives that the benefits which the employees are to receive from union welfare funds shall be specified in a written agreement with the employer and yet to permit the written foundation on which the welfare funds rest . . . to be the subject of oral modifications." *Id.* at 443. The prophylactic policy in § 302(c)(5) guarantees that employer payments into trust funds, as well as employee benefits, be controlled pursuant to a written agreement. *Moglia*, 403 F.2d at 116; *Lewis v. Lowry*, 295 F.2d 197 (4th Cir.1961), *cert. denied*, 368 U.S. 977, 82 S.Ct. 478, 7 L.Ed.2d 438 (1962) (Sobeloff, C.J. dissenting). Thus, maintaining the rigid structure of § 302(c)(5) from any ero-

sion is the best guarantee against "an unintended loophole for the unscrupulous" that may harden the financial cushion created for employees and their families and render meaningless the primary obligation of employers to contribute. *Moglia*, 403 F.2d at 116. *See also Lewis*, 295 F.2d 201.

It is the conclusion of this Court that the side letter of June 26, 1969 did not modify the terms of the milk plant bargaining agreement executed on June 27, 1969, the ice cream plant bargaining agreement executed later that year, or any succeeding agreements. The side letter is an obvious attempt to circumvent the terms of the collective bargaining agreements and clearly violates § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B). The side letter was not presented to the Union membership for ratification as required by Union bylaws, nor was it communicated to the affected Union members. Kraftco, as a signatory of the collective bargaining agreements, either knew or should have known of the ratification process. Thus, this Court rejects as unfounded Kraftco's contention that Vestal had any authority implied or apparent to approve the side letter. Although there is a history of occasional side letters between Kraftco and the Union, most of them concern routine matters not covered by any collective bargaining agreements. The letter of November 8, 1966 modified the collective bargaining agreement without ratification by the membership, but this does not establish a binding prededent upon which Kraftco may rely. The critical distinction between the side letter agreement at issue in this case and the other side letters between the Union and Kraftco is that the previous side letters, unlike the side letter in question, did not diminish the rights of any Kraftco employee — Union member.

The Congressional concern embodied in § 302(c)(5)(B) to protect union funds exacted from employers for employees and their families would be frustrated if a union official could unilaterally bind the Union to a side letter agreement with the employer, absent any authority or notice to the

Union. The objective of Congress is plain. Employer payments to trust funds must be pursuant to a written agreement with a detailed basis for payment. Although the written agreement may be modified, that can only occur pursuant to proper Union authority. No such authority was delegated to Vestal in the present case and, more significantly, the side letter agreement was never ratified by the Union according to the Union's by-laws in 1969 or thereafter. The side letter agreement Vestal entered into with Kraftco to govern Kraftco's contributions to the trust funds was an illicit attempt to alter the effect of the written collective bargaining agreement. Such a practice is precluded under § 302(c)(5)(B).

Additionally, the inefficacy of the side letter under § 302(c)(5)(B) perforce requires that the side letter not stand under ERISA. Applying the arbitrary or capricious standard to review the trustee's decision under Illinois law or affording no deference whatsoever to the trustees' determination, this Court is of the opinion that the side letter agreement is void. Indeed, given the contravention of the side letter agreement with § 302(c)(5)(B), the trustees' determination that the agreement was without effect is far from arbitrary or capricious. Similarly, ERISA's requirement that an employer properly make contractually obligated contributions to trust funds does not disturb any federal law. Thus, Kraftco's failure to abide by the collective bargaining agreements and trust agreements relative to its obligation to trust fund contributions violates Illinois trust laws, ERISA and the LMRA.

The Court now turns its attention to the alternative argument of Kraftco that if the side letter is deemed invalid, the plaintiffs are estopped from denying the provisions in the side letter due to Kraftco's justifiable reliance. In addressing this issue, the Court will apply federal law on estoppel. *Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1108 (9th Cir.1976). Estoppel arguments have

been regularly advanced in circumstances when an employee is seeking to claim a right to a pension from a Union trust fund. *See e.g., Steinmetz,* 517 F.Supp. at 435; *Hodgins v. Central States Southeast and Southwest Areas Pension Fund,* 624 F.2d 760, 762 (6th Cir.1980) (Jones, J., concurring); *Thurber,* 542 F.2d at 1109. Here, Kraftco maintains that its past reliance on the side letter agreement is sufficient to supply the modification to the written collective bargaining agreements and trust agreements that this Court has disallowed under § 302(c)(5)(B).

Kraftco correctly asserts that the Fund and the Union each had a duty to monitor the employer contribution. *Central States Pension Fund v. Central Transport, Inc.,* 522 F.Supp. 658, 664-65 (E.D.Mich.1981). Kraftco takes the position that it relied to its detriment on the practice that the Fund had an affirmative duty to monitor, thus the Fund should be estopped from asserting that the side letter practice was improper. Under the circumstances of this case, estoppel as applied against the Union and the Fund would have the undesirable effect of permitting Kraftco to bypass the protective concerns embodied in § 302(c)(5)(B). The written agreement provision serves the purpose of specifying the employer's duty to make contributions as well as detailing the employee's expectations from the trust fund. The anti-corruptive concerns embodied in § 302(c)(5)(B) would be frustrated. Thus, this Court concludes that estoppel provides no basis for Kraftco to avoid its obligations under the collective bargaining agreements to make trust fund contributions.

There is clear proof that Vestal had no authority to bind the Union and that Kraftco should have realized Vestal's lack of authority. Also, the Union never ratified the agreement to indicate its knowledge of the side letter on which Kraftco could claim justifiable reliance. Moreover, in that the Fund had no dealing in the formulation of the side letter agreement, it is unlikely that estoppel could divest its claim.

The Fund's right to expect proper contributions from Kraftco could not be undermined by secret side agreements in which the Fund's trustees never participated. *Lewis v. Lowry*, 295 F.2d at 202-03 (Sobeloff, C.J., dissenting). In sum, this Court rejects Kraftco's promissory reliance theory to save the illegal side letter agreement.

Having decided that the side letter agreement has no force or effect under the LMRA, ERISA or the law of Illinois and that no estoppel theory saves the side agreement, the Court now addresses whether the trustees acted properly in demanding all contributions due under the collective bargaining agreements. The basic concern is whether requiring Kraftco to pay delinquent fund contributions gives the Fund a windfall as Kraftco suggests or is such remedy necessary to protect the actuarial integrity of the Fund. Given that a suit for recovery for enforcement of trust fund contributions is equitable in nature, *Wardle v. Central States, Southeast and Southwest Areas Pension Funds*, 627 F.2d 820, 829-30 (7th Cir.1980), a windfall to the trust must be avoided.

Kraftco is obligated to make trust fund contributions pursuant to the collective bargaining agreements and trust agreements. In doing so, the Fund receives no windfall because the Fund actually represents thousands of unique agreements between the Union and many employees. Multi-employer pension funds like the plaintiffs have many contributors and many beneficiaries. The relationship between contributors and payments to beneficiaries is not personal and precise. An employee and his family are not necessarily due to receive the contributions he has made. Indeed, some potential beneficiaries never achieve the required period of service so their right to benefits from the trust never vests. Similarly, some employers fail to fulfill their obligations to the trust fund. For example, this Court recognizes that some employers bankrupt while in arrears on trust fund contribu-

tions. Under these circumstances, this Court believes that Kraftco's payment of contributions upholds the actuarial integrity of the trust and thereby yields no windfall.

An appropriate ORDER will enter declaring that the Fund and Union are due pension contributions from Kraftco pursuant to the collective bargaining agreements.

ORDER

Pursuant to the contemporaneously filed Memorandum of Law issued this day in the above-styled case, the side letter agreement adopted in 1969 between the Union and Kraftco governing Kraftco's pension contributions is hereby declared null and void. Judgment enters for the Fund and Union and against Kraftco in the stipulated amount of $246,395.00. Interest on this amount will be calculated from the date payments became due to the date when payments are made, together with all the expenses of collection.

It is further ORDERED that the Fund and Union shall within thirty (30) days, prepare and submit to the Court a computation setting forth the amount of interest and expenses of collection incurred. Kraftco shall have fifteen (15) days thereafter to make objections or comments. If any matter remains unresolved, this Court will set a hearing to determine the amounts of interest and expense of collection.

It is further ORDERED that the motion in limine and motion to dismiss by Kraftco in case No. 78-3135 us (sic) DENIED as moot.

APPENDIX B

Opinion of a Panel of the Court of Appeals

**No. 84-5518
84-5868**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND DANIEL J. SHANNON,
Plaintiffs-Appellees,

v.

KRAFTCO, INC., D/B/A SEALTEST FOODS DIVISION,
Defendants-Appellants.

KRAFT, INC.,
Plaintiff-Appellant,

v.

LOCAL UNION 327, TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: JONES and CONTIE, *Circuit Judges;* and DEMASCIO, *District Judge.**

Per Curiam. This appeal attacks on several grounds the order of the district court requiring appellant Kraftco, Inc. to pay delinquent pension fund contributions. *See Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 589 F. Supp. 1061 (M.D. Tenn. 1984). The dispute centers on conflicting provisions in the collective bargaining agreement between Kraftco and the union repre-

* Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, sitting by designation.

sentative of its employees and in a side letter agreement executed by the company and a union official in June of 1969. The collective bargaining agreements since 1969 have provided that Kraftco will begin making pension contributions when an employee has worked 30 or 90 days. The side letter, however, stated that contributions were not to begin until after 36 months of employment. The court below found that the side letter was not ratified by nor revealed to the union membership and was an attempt to circumvent the terms of the formal collective bargaining agreement. On this basis the court held the side agreement invalid as a violation of the anti-corruptive purposes of section 302(c)(5)(B) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5)(B). The court further refused to apply the doctrine of estoppel to the pension fund's claim for delinquent contributions because of the section 302(c) violation and ruled that the applicable statute of limitations permitted recovery back to January 1, 1969 the effective date of the first conflicting agreement. Kraftco appeals each of these findings and conclusions.

Having considered each of appellant's arguments in turn we find no reversible error and we AFFIRM the order of the district court.

DeMASCIO, District Judge, concurring. I agree with the result reached by the majority opinion. I write separately only to emphasize the overwhelming evidence upon which the district court made its findings of fact. Notwithstanding this evidence, the appellant Kraft, contends that the district court entered eight erroneous findings of fact. This court, however, will not overturn the findings of fact of a district court unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake was committed." *Jetero Construction Co. v. Southern Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. 1976), *quoting United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

Appellant relies almost exclusively on the testimony of James Dreaden, a Kraft employee, in contending that the findings of fact of the district court were erroneous. Dreaden testified that he has been on the negotiating committee representing the union from 1963 until 1974. He testified that he was familiar with the letter agreement and that the "subject matter" of that agreement was discussed openly during committee meetings. Dreaden did not indicate that he had ever seen the actual letter agreement or that it had been submitted to the union membership for ratification.

All of the remaining evidence in the record fully supports the district court's finding that the letter agreement was never presented to the membership for ratification. Billy Burrows, business manager of the local union, testified that he conducted a search of union records and could find no indication that the letter agreement had ever been ratified by the membership. Burrows further testified that he first became aware of the letter agreement in 1978 when it was shown to him by Royce McClintock of Kraft. At that time, McClintock told Burrows that Kraft would begin making future pension contributions consistent with the terms of the collective bargaining agreement, rather than the letter agreement. McClintock himself testified that he was informed of the letter agreement either in 1974 or 1975, but he never mentioned it to the union representatives during the negotiations in which he was involved. When Burrows made inquiry into the individual milk employees' concerns, McClintock told him that Kraft would comply with all future collective bargaining agreement contribution requirements, but, again, McClintock did not mention the letter agreement. T.H. Rose, signatory to the letter agreement on behalf of Kraft, testified that he was not aware whether the letter agreement was presented to the membership for ratification, since that is left to the care of union management.

In light of all this testimony, I am not left with a definite and firm conviction that a mistake was committed by the district court in any of its factual findings. On the contrary, the district court could not have reached any other conclusion but that the letter agreement was never put before the membership for ratification. Even Dreaden's testimony does not indicate that it ever was.

Addressing the concerns raised by the dissenting opinion, it is true that the district court's application of 29 U.S.C. § 186(c)(5)(B) is indeed unusual in this context. Section 186(c)(5)(B) was intended to prevent any tampering with employee trust funds, a situation not even present in this case and an issue not raised by the appellant in this appeal. The district court's conclusion that the letter agreement is invalid is, however, amply supported by the remainder of the district court's factual findings and legal conclusions. It seems to me, therefore, that the district court's misplaced reliance on § 186(c)(5)(B) is harmless at best.

I would award the appellee its costs.

CONTIE, Circuit Judge, dissenting. The majority affirms the judgment of the district court on the ground that the side letter agreement was not a valid modification of the collective bargaining agreement, relying on the fact that the letter was not ratified by the union membership and finding the letter violative of 29 U.S.C. §186(c)(5)(B). Finding that the record and statute dictate a different result, I dissent.

The district court held that the side letter was not part of the contract because it violated 29 U.S.C. §186. The court based this conclusion on the facts that (1) the union never ratified the side letter; (2) Don Vestal, the union president and business agent, had no authority to bind the union to the side letter; and (3) the prior course of dealing in side letters between Sealtest and the union did not implicitly authorize the side letter in question.

29 U.S.C. §186(a) provides:

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce.

29 U.S.C. §186(c)(5) provides an exception, applicable to this case, to these criminal proscriptions.[1] The Supreme

[1] 29 U.S.C. §186(c)(5) provides:

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payment are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

Court has recognized that illegal payments are an exception to an employer's obligations under ERISA. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 88 (1982) (29 U.S.C. §1145). Further, "a federal court has a duty to determine whether a contract violates federal law before enforcing it." *Id.* at 83.

The district court held that the side letter was invalid because it violated §186(c)(5), *an exception to the proscriptions of §186(a)*. Of course, prior to application of the exceptions, §186(a) must be applicable in the first instance. Section 186(a) makes unlawful an agreement by an employer to pay money to a union representative (the trust fund). The agreement to pay in this case is the collective bargaining agreement, the validity of which none of the parties challenge. The side letter need not comply with the terms of §186(c)(5) because it is not an agreement to pay money which is proscribed by §186(a). The side letter is an agreement not to pay money or limiting a pre-existing valid obligation to pay money. The side letter did not implicate the transfer of anything of value from the employer to the union. Accordingly, §186 is not applicable to this case.

Even if §186 were applicable, it appears that the requirements of the §186(c)(5) exception are met. The cases relied on by the district court dealt with *oral* modifications of an agreement which are clearly proscribed by §186(c)(5). *See UMW v. Robinson*, 455 U.S. 562, 570 (1982) (§186 doesn't require reasonableness). Further, it is clear that the written agreement required by §186 need not be a collective bargaining agreement as long as it sets out the employer's obligation to contribute. *Doyle v. Shortman*, 311 F. Supp. 187, 194 (S.D. N.Y. 1970); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970). The side letter construed with the collective bargaining agreement meets these standards.

The district court's objections, however, also address whether the side letter was a valid part of the contract as a

matter of contract law. The Court has cautioned that "when neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract," *UMW v. Robinson*, 455 U.S. at 576 (footnote omitted), and interpretation of collective bargaining agreements is governed by federal law, *United Steelworkers v. North Bend Terminal Co.*, 752 F.2d 256, 259 (6th Cir. 1985).

The district court's conclusion that the union's failure to ratify the side letter voids its validity has no support in the case law. We have consistently held that it is an unfair labor practice for a company to refuse to sign a contract without union ratification. *NLRB v. Seneca Environmental Products*, 646 F.2d 1170 (6th Cir. 1981); *NLRB v. C&W Lektra Bat Co.*, 513 F.2d 200 (6th Cir. 1975).

> It is well established that in the absence of a limitation, or employer knowledge of a limitation, placed upon the power of a collective bargaining agent, there is no legal impediment to an employer agreeing with a union to change substantive terms of an existing agreement. Indeed, in such a case there is no legal requirement that the negotiated agreement even be submitted to the membership for ratification because a duly designated labor representative has a statutory duty to make binding agreements with respect to wages, rules and other working conditions. . . . A unilateral failure of a union to follow its own rules is an insufficient basis to invalidate agreements entered into by a union and an employer.

Conran v. Great Atlantic & Pacific Tea Co., 499 F. Supp. 727, 730 (E.D. Pa. 1980). The union constitution in this case did provide for ratification. However, there is no evidence that the employer knew of this provision especially in light of the clear proof of a course of dealing between Sealtest and the Union whereby both parties recognized such side letter agreements as binding absent evidence of ratification.

Further, "internal union matters, including the provision of a Union's Constitution, cannot relieve an employer from its bargaining duty or effect the validity of collective-bargaining agreements." *NLRB v. Electra-Food Machinery, Inc.*, 621 F.2d 956, 958 (9th Cir. 1980).

The district court also found that Vestal, as president and business agent, had no authority to bind the union to the side letter. However, "[t]he Union, by virtue of its certification as exclusive bargaining agent, was empowered by its members to make agreements on behalf of the employees it represented without securing the approval of those employees." *Houchens Market v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967). "[A]n employer may rely upon the apparent authority of the Union representatives to conclude an agreement, where there is a basis for such reliance." *NLRB v. Local Union No. 100, Teamsters*, 532 F.2d 569, 571 (6th Cir.), *cert. denied*, 429 U.S. 859 (1976). In this case, the prior course of dealing in letter agreements provided a basis for such reliance. "In construing the collective bargaining agreement, . . . [we] must take into account any existing common law of the particular plant or industry, for it is an intgegral (sic) part of the contract." *Norfolk Shipbuilding and Drydock Corp. v. Local No. 684*, 671 F.2d 797, 799-800 (4th Cir. 1982). Further, we have recognized the effect of such letter agreements in the past, *Capital City Lumber Co. v. NLRB*, 721 F.2d 546, 548-49 (6th Cir. 1983), *cert. denied*, 104 S. Ct. 1291 (1984), and nothing in the collective bargaining agreement bars such agreements, *Turner v. Local Union No. 302, Teamsters*, 604 F.2d 1219, 1226 (9th Cir. 1979). There is no support for the district court's conclusion that this side agreement, unlike the others, is void because it diminishes the rights of union members. No rule of the federal common law of contracts provides that a contract may be modified in favor of one party but not the other.

Accordingly, I would reverse the judgment of the district court.[2]

[2] Congress has provided remedies for such breaches of fiduciary duty by union officers through the LMRDA.

APPENDIX C

Opinion of the Court of Appeals *En Banc*

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and Daniel J. Shannon, *Plaintiffs-Appellees*,

v.

KRAFTCO, INC., d/b/a Sealtest Foods Division, *Defendant-Appellant*,

KRAFT, INC., *Plaintiff-Appellant*,

v.

LOCAL UNION 327, TEAMSTERS, CHAUFFEURS, HELPERS AND TAXI-CAB DRIVERS, *Defendant-Appellee*.

Nos. 84-5518, 84-5868.

United States Court of Appeals, Sixth Circuit.

Argued June 4, 1986.

Decided Sept. 2, 1986.

Before LIVELY, Chief Judge, and ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE,* KRUPANSKY, GUY, NELSON, RYAN and BOGGS, Circuit Judges.

CONTIE, Circuit Judge.

Appellant Kraftco, Inc., appeals from an order of the district court granting judgment in favor of plaintiffs Central States Southeast and Southwest Areas Pension Fund (hereinafter, Central States), Director Daniel J. Shannon, and Teamsters Local Union 327 (hereinafter Local 327) on plaintiffs' complaint seeking delinquent pension contributions pursuant to 29 U.S.C. §§ 185, 1132, 1145. Finding the judgment of the district court premised on erroneous factual and legal conclusions we reverse.

I.

On April 11, 1978, plaintiffs Shannon and Central States filed a complaint against Sealtest Foods (Kraftco) pursuant to 29 U.S.C. §§ 185, 1132, 1145, and state law. The complaint alleged that Kraftco was obligated to make contributions to Central States pursuant to a collective bargaining agreement between Local 327 and Kraftco, and that defendant "has failed and refused to make certain of the required payments as required on their respective dates." Central States sought $146,000 in delinquent contributions, collection costs, and attorney fees, and an order of specific performance of the collective bargaining agreement.

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* The Honorable Leroy J. Contie, Jr., assumed senior status on July 1, 1986.

On February 6, 1979, Kraftco filed a complaint against Local 327 pursuant to 29 U.S.C. § 185, and 28 U.S.C. §§ 1337, 2201, 2202. The complaint alleged that "plaintiff and defendant have entered into successive formal collective bargaining agreements. In addition to these agreements, certain matters have been resolved through letters of understanding signed by duly authorized representatives of plaintiff and defendant." Pursuant to such a letter, Kraftco alleged that "regular pension payments on employees covered by the collective bargaining agreement . . . were to commence only at such time as such employees had been in the employ of plaintiff for a period of thirty-six (36) months." Kraftco alleged that the union's insistence that the letter specifying the 36-month period was of no effect was a threatened breach of the collective bargaining agreement. Kraftco sought a declaratory judgment that Kraftco had no obligation to make the payments demanded by the union, that the letter agreement was a binding agreement, and that the union had violated the agreement. On March 30, 1979, the two cases were consolidated. Trial was held on March 15, 1982, and, on May 9, 1984, the court entered judgment against Kraftco in the amount of $246,395. 589 F. Supp. 1061 (M.D.Tenn.1984).[1] The following evidence was adduced at trial.

Royce McClintock, general manager of Kraftco, testified that he had final authority in collective bargaining matters, and that he was informed of the side agreement in question in 1974 by Don Spencer of Kraftco. McClintock testified that side agreements were a matter of general practice

[1] On September 17, 1979, Central States, Shannon, and Local 327 moved for summary judgment. On July 16, 1981, the district court granted the union's motion to dismiss Kraftco's action against the union, but denied other motions, holding that "resolution of the central dispute in this action depends upon the intent of Kraft, Inc. and the Union in their execution of Collective Bargaining Agreements after April 20, 1972." 527 F.Supp. 420, 422 (M.D.Tenn.1981). On June 23, 1982, we reversed the district court's dismissal of Kraftco's action against the union. 683 F.2d 131 (6th Cir.1982).

between Kraftco and Local 327. McClintock admitted that the 1969 side agreement was never mentioned in the 1975 negotiations.

T.H. Rose, employed by Kraftco prior to 1974 as general manager, had the final authority with respect to collective bargaining agreements, and was the chief company negotiator in 1966. Rose testified that the side agreement in question was executed on June 27, 1969 to "clarify the meaning of the contract," and was signed by himself and Union President Don Vestal. The collective bargaining agreement was signed that same day. The collective bargaining agreement provided that the company would make pension contributions for regular employees who started work, while the side agreement provided that the company would make payments only for employees who had been with the company for 36 months. Rose testified that the company understood a regular employee to be one who had been with the company for 36 months. Further, "[i]t was the understanding that this letter remain in effect until it was changed." Other side agreements were entered into and adhered to through consecutive collective bargaining agreements. Rose also testified that the letter agreement applied to the ice cream plant contract negotiated in August 1969. Rose could recall no mention of the side letter in later negotiations.

Donald Spencer conducted contract negotiations for Kraftco from 1965 to 1980, and indicated that Local 327 represented both milk plant and ice cream plant personnel. Spencer testified regarding past custom in executing letter agreements. Spencer testified that the company and union had entered into several letter agreements which altered the terms of the collective bargaining agreement upon the assent of a representative of the union and company. Spencer indicated that he was never informed that these letter agreements were subject to union ratification. Spencer further testified that the letter agreements were to remain in effect until "negotiated out."

Spencer indicated that he was the chief spokesman for the company during the 1969 negotiations, and that a member from the international union was present at times. Spencer testified that he was never told that any agreement between Local 327 and the company was conditioned on approval by the International, but that the International representative stated that the provision requiring employment for 36 months before contributions were paid would have to be changed. The 36-month requirement had been carried over from other agreements. Spencer testified that the 36-month period was desirable because of the high turnover of employees and enabled the company to avoid making contributions for persons who would never benefit from them. Spencer testified that in 1969 the parties agreed to continue the 36-month requirement through the letter agreement. The letter agreement also included a reference to making employees "whole." "Our intent . . . was to make any employee of ours whole if by not paying benefit payments for his first 36 months of employment would cause him to have any loss of pension benefits." Spencer testified that, before the entire bargaining committee, Vestal indicated that he "would give us a letter concerning this 36-months' payment and that it would be no problem to delete the language from the contract."

Spencer testified that, to make employees' "whole," Kraftco forwarded checks for the three years of contributions to Central States. Spencer further testified that Vestal told him that the letter agreement would apply to both the milk and ice cream plant contracts. Spencer testified that the union first complained about the contributions in 1977.

James Dreaden was a member of the Kraftco bargaining unit until 1975 when he joined management. Dreaden was a member of the union negotiating committee from 1963 to 1974, and indicated that the side agreement was discussed by the committee in 1969. Dreaden testified that it was his understanding that the letter agreement continued in effect through the subsequent collective bargaining agreements.

Dreaden testified:

Q. . . . I believe your testimony was that the company proposed that the 36 month exclusion would continue in 1969, is that correct?
A. That's true.
Q. Did the union accept that proposal in 1969?
A. When it was taken before the membership, it was ratified and then accepted.

On cross-examination,

Q. Just one question. You didn't have the side letter when it was taken to the union for ratification, did you?
A. No, sir.
Q. All right.
A. But it was explained and they were informed.
Q. They were informed of what? Were they informed of what was in the written contract or what was in the side letter that hadn't been printed at that time?
A. At the time that we had taken it to the membership for ratification, the contract per se was not in a contract form. We had taken the proposals and they accepted the proposals. Then it was compiled together as a contract.

Billy Burrows, business agent for the union in 1971, testified that he participated in negotiations with Kraftco and never heard of the letter agreement until 1977. Burrows testified that there was no copy of the letter in the union records. However, Burrows could find no record whatsoever of the 1969 negotiations.

The following documents were presented to the district court. The Trust Agreement creating Central States, as amended in 1957, provided in Article III § 1 that "[e]ach Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable Collective Bargaining Agreement between the parties. The obligation to make such contributions shall continue during periods when

the Collective Bargaining Agreement is being negotiated." Further, "[t]his Agreement shall in all respects be construed according to and be governed by the laws of the State of Illinois." *See* 1970 Agreement, 1974 Agreement, 1978 Agreement.

The collective bargaining agreement, effective January 1, 1966 to December 31, 1968, provided:

> The Employer shall pay to the Central States Southeast and Southwest Pension Fund . . . the sum of four dollars ($4.00) per week, for each employee covered by this Agreement who has been on the payroll thirty-six (36) months or more.

The agreement, effective January 1, 1969 to December 31, 1971, and subsequent agreements, provided in Article XII:

> The Employer shall pay to the Central States . . . the sum of six dollars ($6.00) per week, for each employee covered by this Agreement upon his becoming a *regular employee*.

(Emphasis added).

The controversial letter agreement was type-dated June 26, 1969, hand-dated June 27, 1969, and signed by Rose and Spencer for Sealtest and Vestal for the union. The letter provided in full:

> As per our conversation of June 26, 1969, and our agreement of such time, Sealtest Foods will continue to commence regular pension payments on our employees when such employees have been in our employ for a period of thirty-six (36) months. Said pension payments shall then continue as stipulated in our present labor agreement.
>
> If you concur in this agreement, please sign one copy and return to us.

> We realize this may require some possible discussion and adjustment for some specific individuals during the life of our labor agreement.

The union constitution provided in section 26(A):

> Whenever a collective bargaining agreement is about to be negotiated, modified or extended at the request of this Local Union, the President shall call a meeting at which the membership shall determine and authorize the bargaining demands to be made.

Subsection (B) provided:

> Proposed collective bargaining agreements or amendments shall be submitted by the Secretary-Treasurer of the Joint Council and Area Conference, as required by the Area Conference Bylaws, for approval before submission to the employer.

Subsection (C) provided in pertinent part:

> Ratification of agreements or amendments shall be subject to vote in the same manner as provided for in connection with bargaining demands set forth in Section 26(A), or in the case of area-wide or conference-wide agreements in accordance with the Constitution and rules adopted by such bargaining group.

The district court viewed Central States' action as composed of claims pursuant to state law, 29 U.S.C. § 185, and 29 U.S.C. §§ 1132, respectively. 589 F.Supp. at 1069. The court held that all claims were timely. "Under Illinois law, the Fund's action for enforcement of the trust plans is essentially one for recovery of money pursuant to a written agreement." *Id.* at 1069 n. 1.[2] The court applied the Illinois

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[2] The court held:

> In reviewing the trustees' decision under the laws of the state of Illinois, this Court recognizes that the jurisdictional basis for review rests upon 28 U.S.C. § 1332 diversity of citizenship. Pursuant to the

(Footnote 2 continued on next page)

ten-year limitations period. Ill.Rev.Stat. Ch. 110, § 13-206. ERISA liability was further limited by 29 U.S.C. § 1144(b)(1) which provides that "[t]his section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." *Id.* at 1070. With respect to the LMRA claims, the court held that Tennessee's six-year limitation period, Tenn.Code Ann. § 28-3-109, limited recovery to acts after April 20, 1972. *Id.* at 1070.

The district court resolved the threshold question to be whether the side letter agreement was a valid alteration of the collective bargaining agreement. *Id.* at 1072. For several reasons, the court found that the side letter was void pursuant to 29 U.S.C. § 186(c)(5).

> It is the conclusion of this Court that the side letter of June 26, 1969 did not modify the terms of the milk plant bargaining agreement executed on June 27, 1969, the ice cream plant bargaining agreement executed later that year, or any succeeding agreements. The side letter is an obvious attempt to circumvent the terms of the collective bargaining agreements and clearly violates § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B). The side letter was not presented to the Union membership for ratification as required by Union bylaws, nor was it communicated to the affected Union members. Kraftco, as a signatory of the collective bargaining agreements, either

(Footnote 2 continued from previous page)

> doctrine enumerated in *Erie R.R. v. Tompkins*, [304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188] . . . this Court must apply the substantive law of Tennessee including Tennessee conflict of laws. . . . The general conflicts rule in Tennessee governing contracts is that the law of the place of making governs unless the parties express a contrary intent for another state's law to apply. . . . In this case the parties have agreed in the trust agreement that all disputes would be governed under Illinois law. Such an agreement is not contrary to the public policy of Tennessee. . . . Thus, the Trustee's decision that the side letter agreement modifying the obligation of Kraftco to make pension contributions is examined under the laws of the state of Illinois.

589 F.Supp. at 1070-71 n. 2.

> knew or should have known of the ratification process. Thus, this Court rejects as unfounded Kraftco's contention that Vestal had any authority implied or apparent to approve the side letter. Although there is a history of occasional side letters between Kraftco and the Union, most of them concern routine matters not covered by any collective bargaining agreements. The letter of November 8, 1966 modified the collective bargaining agreement without ratification by the membership, but this does not establish a binding precedent upon which Kraftco may rely. The critical disposition between the side letter agreement at issue in this case and the other side letters between the Union and Kraftco is that the previous side letters, unlike the side letter in question, did not diminish the rights of any Kraftco employee — Union member.
>
> The Congressional concern embodied in § 302(c)(5)(B) to protect union funds exacted from employers for employees and their families would be frustrated if a union official could unilaterally bind the Union to a side letter agreement with the employer, absent any authority or notice to the Union. The objective of Congress is plain. Employer payments to trust funds must be pursuant to a written agreement with a detailed basis for payment. Although the written agreement may be modified that can only occur pursuant to proper Union authority. No such authority was delegated to Vestal in the present case and, more significantly, the side letter agreement was never ratified by the Union according to the Union's by-laws in 1969 or thereafter. The side letter agreement Vestal entered into with Kraftco to govern Kraftco's contributions to the trust funds was an illicit attempt to alter the effect of the written collective bargaining agreement. Such a practice is precluded under § 302(c)(5)(B).

Id. at 1073-74. The court rejected Kraftco's estoppel argument on the ground that such a theory would violate

§ 302(c)(5)(B). *Id.* at 1075. The court relied on the fact that the union and Central States had no knowledge of the side agreement.

On November 26, 1985, we affirmed the judgment of the district court, with each judge writing separately. On February 18, 1986, the court vacated the panel's decision and ordered that the case be heard *en banc*. The parties have filed supplemental briefs.

II.

Central State's action is comprised of claims based on three different theories. First, Central States seeks to recover for breach of the trust agreement pursuant to ERISA, 29 U.S.C. § 1132(a). Second, Central States, as a third-party beneficiary of the collective bargaining agreement, seeks to recover based on Kraftco's alleged breach of the collective bargaining agreement pursuant to 29 U.S.C. § 185, section 301 of the Labor Management Relations Act. Third, Central States seeks to recover for breach of the trust agreement pursuant to state law. Accordingly, we consider the periods of limitation applicable to these actions.

A.

The district court properly noted that ERISA only applies to acts occurring after January 1, 1975. 29 U.S.C. § 1144(a), (b)(1).[3] *See* 29 U.S.C. § 1114(a). Accordingly, suits

[3] These subsections provide:

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

for violation of the trust agreements based on acts or omissions occurring prior to that date cannot be prosecuted under ERISA.

Apart from section 1144(b)(1), ERISA does not provide a period of limitation applicable to the pending case.[4] "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so." *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 1942, 85 L.Ed.2d 254 (1985) (footnote omitted) (applying 42 U.S.C. § 1988); *United Automobile Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696, 703-04, 86 S.Ct. 1107, 1112, 16 L.Ed.2d 192 (1966). *See DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 158, 103 S.Ct. 2281, 2287, 76 L.Ed.2d 476 (1983). "By adopting the statute governing an analogous cause of action under state law, federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson,* 105 S.Ct. at 1945. In following this analysis, "we must characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate principle." *Wilson,* 105 S.Ct. at 1943. "The characterization of . . . [plaintiff's claim] for statute of limitations purposes is derived from the elements of the cause of action, and Congress' purpose in providing it. These, of course, are matters of federal law." *Id.; DelCostello,* 462 U.S. at 159 n. 13, 103 S.Ct. at 2288 n. 13; *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 60-61, 101 S.Ct. 1559, 1563, 67 L.Ed.2d 732 (1981) (how an action is characterized "depends upon an examination of the nature of the federal claim and the federal policies involved."); *Hoosier Cardinal Corp.,* 383 U.S. at 706, 86 S.Ct. at 1113. However, "there is no reason to reject the characterization that state law would impose

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[4] Neither of the parties argue that 29 U.S.C. § 1113 applies to this case, and we, accordingly, do not consider this issue.

unless that characterization is unreasonable or otherwise inconsistent with national labor policy." *Hoosier Cardinal Corp.*, 383 U.S. at 706, 86 S.Ct. at 1113; *Headrick v. American District Telegraph Co.*, 526 F.Supp. 604, 606 (E.D.Tenn.1980). But this deference is "a matter of preference or comity — not obligation." *Wilson*, 105 S.Ct. at 1944 n.22.

In actions for breach of trust agreements under ERISA the courts have applied periods of limitation for actions for breach of written contracts. *See Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247, 253 (7th Cir.1983); *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir.), *cert. denied*, 464 U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983); *Haynes v. O'Connell*, 599 F.Supp. 59, 62 (E.D.Tenn.1984); *Nolan v. Aetna Life Insurance Co.*, 588 F.Supp. 1375, 1379 (E.D.Mich.1984). *But see Cowden v. Montgomery County Society for Cancer Control*, 591 F.Supp. 740, 755 (S.D.Ohio 1984) (applying statute for actions based "upon a liability created by statute"). Tennessee law specifies a six-year limitation period for actions on written contracts, which appears applicable to this action. *Haynes*, 599 F.Supp. at 62; Tenn.Code Ann. § 28-3-109(a)(3).[5]

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[5] Although the trust agreement specified that it was to be governed and construed in accord with Illinois law, plaintiffs' claims are brought pursuant to the federal statutory cause of action created by Congress in 29 U.S.C. § 1132. Accordingly, we are bound to apply neither Illinois procedural nor substantive law. *See Champion Int'l Corp. v. United Paperworkers Int'l Union*, 779 F.2d 328, 333 (6th Cir.1986). *See also Allis-Chalmers v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206 (1985); *In re White Farm Equipment Co.*, 788 F.2d 1186, 1191 (6th Cir.1986). Application of the ten-year Illinois period, argued by the plaintiffs and adopted by the district court, would not require a different result since ERISA claims are available only from January 1, 1975, *see* note 3, *supra*, and, accordingly, would not be barred regardless of whether Illinois or Tennessee law applies.

(Footnote 5 continued on next page)

Kraftco contends, however, that the six-month period specified in 29 U.S.C. § 160(b)[6] for filing complaints with the National Labor Relations Board renders the state statute inapplicable on the ground that the pending case is not a simple contract claim, but rather an attack on the negotiating process akin to an action for breach of the duty of fair representation. *See DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). Kraftco argues that

> [b]ecause a challenge to an employer's decision relative to pension obligations constitutes a challenge to the finality of the decision-making process agreed upon between the employer and the union, such claims are to be measured by the principles of exclusive representation and the union's duty to fairly carry out its obligation to all unit employees. To claim that the contract has been breached by the employer is to challenge the "fairness of the decision-making process" in effect between the union and the employer. Thus, such suits are by their nature a challenge both to the employer's adherence to contract terms and the union's extinguishment of its fair representation obligations.

Specifically, Kraftco argues:

> The gravamen of the Fund's complaint is that the thirty-six (36) month deferral practice embodied in the June 27, 1969, letter agreement is an unenforceable condition

(Footnote 5 continued from previous page)

Kraftco also contends that Tenn.Code Ann. § 50-2-205 provides the appropriate limitation period. That section provides that "[c]ourt action under this part may be commenced no later than two (2) years after the cause of action occurs." "[T]his part" apparently refers to Tenn.Code Ann. § 50-2-202 which prohibits discrimination in pay based on sex. Accordingly, the two-year period is inapplicable.

[6] 29 U.S.C. § 160(b) provides in pertinent part:

[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . .

on Kraft's duty to make contribution to the Fund. The very process of collective bargaining has been implicated by the complaint in this case. The Fund has alleged that Kraft had no right to rely upon the representations of Local 327 as the exclusive bargaining representative of Kraft's employees. The Fund thus has attempted to establish that the resultant agreement breached the union's duty to bargaining unit members.

For several reasons, we reject Kraftco's arguments and find application of the six-month period inappropriate. First, Central State's complaint in this case is lodged solely against the employer and relates solely to the employer's failure to comply with the terms of the collective bargaining agreement. Central States' complaint does not allege a breach of the duty of fair representation and can in no way be construed to allege improper action by the union or any of its members.

Second, the facts upon which Central States bases its claim simply do not implicate the duty of fair representation. In *NLRB v. Local 299, International Brotherhood of Teamsters*, 782 F.2d 46, 50 (6th Cir.1986), we noted, analyzing Supreme Court and circuit precedent, that "[t]he duty of fair representation has primarily been associated with contract negotiation and the enforcement of that contract through grievance processing." (Footnotes omitted). We declined to expand the duty "to include an undefined fiduciary duty which a union owes to its unit as a whole," and held that the duty "was never intended to be a 'catch all' for undesirable union activity." *Id.* at 51. "[T]he duty of fair representation is implicated only when an individual or group is treated differently by a union . . . than another individual, group or the collective." *Id.* at 51-52. Since the complaint did not allege a breach of the duty of fair representation and the factual basis of the complaint does not implicate differential treatment, we cannot characterize the claim as one for breach of the duty of fair representation.

Third, the issues in this case are what constitutes the contract of the parties and whether the employer complied with that contract, and may be decided by reference to principles of contract and agency law apart from the federal statutes that procedurally give rise to these claims and our jurisdiction. Central States' action is, so to speak, a creature of contract law, rather than labor law. *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1272 (7th Cir.1985); *Jenkins*, 713 F.2d at 253 n. 7.

Fourth, *DelCostello* does not require a different result. In *DelCostello*, the Court held that the six-month limitation period of 29 U.S.C. § 160(b), governing unfair labor practices before the NLRB, applied to actions pursuant to 29 U.S.C. § 185 alleging the employer's breach of a collective-bargaining agreement and the union's breach of its duty of fair representation. The Court recognized that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law" and that "it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law." 462 U.S. at 161, 103 S.Ct. at 2289. Further, the Court found "no close analogy in ordinary state law," *id.* at 165, 103 S.Ct. at 2291, for the hybrid § 301 claim and reject application of state arbitration statutes because of the poor analogy and brevity of the period provided, typically 30 to 90 days. *Id.* at 166, 103 S.Ct. at 2291. The Court rejected the analogy to state malpractice statutes, in part on the ground that "application of a longer malpractice statute as against unions would preclude the relatively rapid final resolution of labor disputes favored by federal law." *Id.* at 168, 103 S.Ct. at 2292. The Court settled on the six-month period in part to avoid applying different limitation periods to the § 301 hybrid claims, an element not present in the pending case. *Id.* at 169 n. 19, 103 S.Ct. at 2293 n. 19.

DelCostello does not compel application of section 10(b) in this case. We have held that "[a]ttention to the reasoning of *DelCostello* and its own express limitations indicated that *DelCostello* is not a 'green light' to apply 29 U.S.C. § 160(b) to all actions in which federal labor law is implicated." *Carruthers Ready-Mix, Inc. v. Cement Masons Local Union No. 520*, 779 F.2d 320, 327 (6th Cir.1985);[7] *Champion Int'l Corp. v. United Paperworkers Int'l Union*, 779 F.2d 328 (6th Cir.1985). Tennessee law, as discussed above, provides a limitation period for state actions which are analogous to the ERISA claims in this case, unlike *DelCostello* in which no state limitation period represented a balancing of the unusual combination of interests implicated in a hybrid § 301 action. Further, application of the state limitation period is not inconsistent with the policies underlying federal labor law. *DelCostello* emphasized that rapid resolution of labor disputes is favored when the collective bargaining process is threatened. However, "speed and finality may not be as pressing concerns where the underlying dispute concerns a pension plan rather than day-to-day employment matters." *United Independent Flight Officers, Inc.*, 756 F.2d at 1273; *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52, 55 (3d Cir.), *cert. denied*, ___ U.S. ___, 106 S.Ct. 130, 88 L.Ed.2d 107 (1985); *Adams v. Gould, Inc.*, 739 F.2d 858, 867 (3d Cir.1984), *cert, denied*, ___ U.S. ___,

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7 In *DelCostello*, the Court held:

We stress that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere. We do not mean to suggest that federal courts should eschew use of state limitations periods anytime state law fails to provide a perfect analogy. . . . On the contrary, as the courts have often discovered, there is not always an obvious state-law choice for application to a given federal cause of action; yet resort to state law remains the norm for borrowing of limitations periods.

462 U.S. at 171, 103 S.Ct. at 2294.

105 S.Ct. 806, 83 L.Ed.2d 799 (1985).[8] Therefore, *DelCostello* does not require application of section 10(b) in this case.

Accordingly, since this is not a duty of fair representation case, and since *DelCostello* does not require deviation from the traditional rule of resort to state statutes of limitations, we hold that the six-year period provided by Tennessee law applies to Central States' ERISA claims.

B.

Central States also maintains an action, as third-party beneficiary, for breach of the collective bargaining agreement pursuant to section 301 of the LMRA. The district court held that the six-year Tennessee period of limitations for contract actions applied. We have previously held that actions based on breach of collective bargaining agreement are governed, under Tennessee law, by Tenn.Code Ann. § 28-3-109 and its predecessors which specify a six-year period of limitation.[9] *Sanders v. Louisville & N.R. Co.*, 144

[8] In *Adams*, the plaintiffs alleged that the union breached its duty of fair representation in settling pension disputes with the employer. The court held that 29 U.S.C. § 1114 governed that claim rather than 29 U.S.C. § 160(b). *Adams* is, of course, different from this case in that *Adams* was plainly a duty of fair representation case challenging the union's conduct while Central States challenges not the union or Vestal's conduct as proper or improper, but rather argues that the side letter has no effect as a matter of contract law. Accordingly, we cite *Adams* for the propositions that *DelCostello* does not require application of section 10(b) in all labor cases and that cases involving pension obligations may implicate special concerns. We express no opinion with respect to the holding of *Adams* on its facts, and recognize the concerns expressed by Justices White, Powell and Brennan in their dissent to denial of the petition for certiorari in that case. 105 S.Ct. at 808.

[9] Tenn. Code Ann. § 28-3-109(a)(3) provides:

> The following actions shall be commenced within six (6) years after the cause of action occurred.

(3) Actions on contracts not otherwise expressly provided for.

F.2d 485, 486 (6th Cir.1944). *See Haynes,* 599 F.Supp. at 62. This is consistent with other courts which have applied state limitation periods for contract actions to claims under section 301 for breach of collective bargaining agreements. *Smith v. Kerrville Bus Co.,* 748 F.2d 1049, 1051 (5th Cir.1984); *O'Hare v. General Marine Transport Corp.,* 740 F.2d 160, 167-68 (2d Cir.1984), *cert. denied,* ___ U.S. ___, 105 S.Ct. 1181, 84 L.Ed.2d 329 (1985). *See Int'l Ass'n of Machinists v. Allied Products Corp.,* 786 F.2d 1561, 1563 (11th Cir.1986). Accordingly, the district court did not err in applying the six-year limitation period.

C.

The district court concluded that state law claims for breach of the trust agreement were subject to the ten-year limitations period under Illinois law and survived ERISA's preemption provisions. However, as Kraftco argues in its supplemental brief to the *en banc* court, state claims for breach of the trust agreement are clearly preempted by 29 U.S.C. § 185.[10] In *Allis-Chalmers v. Lueck,* 105 S.Ct. 1904 (1985), the Court held that section 301 preempted a state claim for bad faith handling of an insurance claim by the plaintiff's employer and insurer. State law contract claims are preempted "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 1916. The Court focused on whether state law "confers nonnegotiable state law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the [state law] claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 1912.

[10] Although it is unclear whether Kraftco raised this argument before the district court, the issue of survival of state claims is clearly presented by the district court's analysis. We do not decide that district courts need address this preemption question *sua sponte. Int'l Longshoremen's Ass'n v. Davis,* ___U.S.___, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986).

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their contract claims as claims for tortious breach of contract.
>
> Were state law allowed to determine the meaning intended by the parties in adopting a particular contract phrase or term, all the evils addressed in [*Teamsters v.*] *Lucas Flour* [*Co.*, 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593] would recur. The parties would be uncertain as to what they were binding themselves to when they agreed to create a right to collect benefits under certain circumstances. As a result, it would be more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate.

105 S.Ct. at 1911. In this case it is clear beyond peradventure that the state action for breach of the trust agreement which incorporates the collective bargaining agreement is dependent on analysis of the labor contract, and our attention is drawn to no non-negotiable state created rights independent of the collective bargaining agreement. Accordingly, the "claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 1916. Accordingly, the state law claim for breach of the trust agreement is preempted by section 301.[11]

[11] *But see Carpenters Health & Welfare Fund of Philadelphia & Vicinity v. Ambrose, Inc.*, 727 F.2d 279, 282 n. 5 (3d Cir.1983).

III.

Pursuant to Fed.R.Civ.P. 52(a), we review the district court's findings of fact for clear error. In *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985), the Court reiterated that a reviewing court may only overturn the district court's findings when the court "is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). "The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court." *Anderson*, 105 S.Ct. at 1511. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 1512. Further, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only a trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in which is said." *Id.* However, "construction of collective bargaining agreements and employee benefit plans is a question of law fully reviewable by this court." *Teamsters Local 348 Health & Welfare Fund v. Kohn Beverage, Inc.*, 749 F.2d 315, 317-18 (6th Cir.1984), *cert, denied*, __U.S.__, 105 S.Ct. 2024, 85 L.Ed.2d 305 (1985).[12]

In this case, the district court held that the letter agreement was not a valid modification of the collective bargaining agreement pursuant to 29 U.S.C. § 186, section 302 of the LMRA, apparently reaching this conclusion based on three subsidiary premises: that the agreement was not ratified, that the union president had no authority to enter into the agreement, and that past letter agreements did not

[12] The district court held that the side letter agreement was void under any standard of review. 589 F.Supp. at 1074.

constitute a course of dealing.[13] The district court did not conclude that, as a matter of contract law, its findings required the conclusion that, independent of 29 U.S.C. § 186, the letter agreement did not modify the collective bargaining agreement. However, because this alternative ground upon which to uphold the district court's decision is clearly suggested by its findings, we consider it here.

A.

29 U.S.C. § 186(a) provides:

It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value —

(1) to any representative of any of his employees who are employed in an industry affecting commerce.

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[13] Judge DeMascio's concurring opinion to the panel's disposition of the appeal notes that Kraftco did not challenge in its brief on appeal the district court's application of 29 U.S.C. § 186. This issue is properly before the court. First, Kraftco, on appeal, attacked the premises on which the district court's section 302 conclusions rested — apparent authority, union ratification, and past dealings — and argued that no provision of federal labor law required setting aside the side agreement. Second, the union and pension fund have cited section 302 extensively as the basis for upholding the district court's order. ***Batson v. Kentucky***, __U.S.__, 106 S.Ct. 1712, 1729, 90 L.Ed.2d 69 (1986) (Stevens, J., concurring) (issue is properly presented where "the party defending the judgment has explicitly rested on the issue in question as a controlling basis for affirmance.") Third, the panel's *per curiam* explicitly approved the district court's application of section 302. Under these circumstances, the propriety of applying section 302 is properly before the court.

29 U.S.C. § 186(c)(5) provides an exception to this proscription.[14] "If any one of these exceptions applies, the general prohibition of § 302 does not operate." *The Washington Post v. Washington-Baltimore Newspaper Guild, Local 35*, 787 F.2d 604, 606 (D.C.Cir.1986). Section 302(e) provides only for injunctive relief, 29 U.S.C. § 186(e); *Sellers v. O'Connell*, 701 F.2d 575, 578 (6th Cir.1983), and criminal penalties, 29

[14] 29 U.S.C. § 186(c)(5) provides:

The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

U.S.C. § 186(d).[15] However, the Supreme Court has recognized that illegal payments are an exception to an employer's obligations under ERISA. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 88. 102 S.Ct. 851, 862, 70 L.Ed.2d 833 (1982) (29 U.S.C. § 1145). Further, "a federal court has a duty to determine whether a contract violates federal law before enforceing it." *Id.* at 83, 102 S.Ct. at 859.

The purpose of section 302 is to "punish certain criminal activity in the conduct of union affairs, and thereby help to drive criminals from the labor movement." H.Rep. No. 741, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2433. The statute was amended in 1959

> in order to clarify certain ambiguities which have arisen under existing law. Under existing law it is illegal for an employer to pay or deliver anything of value to a representative of his employees, except in those instances permitted by subsection (c) of section 302. The purpose of these amendments to section 302 is to forbid any payment, loan, or bribe by an employer, employer association, or anyone acting on an employer's behalf. . . . The demand or acceptance of such payment, loan, or bribe is also proscribed.

Id. at 2469. *See The Washington Post*, 787 F.2d at 606-07.

The district court held that the side letter was invalid because it violated section 302(c)(5), *an exception to the proscriptions of section 302(a).* Of course, prior to application of the exceptions, section 302(a) must be applicable in the first instance. Section 302(a) makes unlawful an agreement by an employer to pay money to a union representative (the trust fund). The agreement to pay in this case is the

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[15] Plaintiffs' remedy, as they seem to recognize, for Vestal's allegedly unauthorized behavior is set forth by Congress at 29 U.S.C. § 501. Our conclusion, *infra*, that Vestal had apparent authority to enter into the letter agreement is not inconsistent with a finding that he lacked actual authority to so agree.

collective bargaining agreement, the validity of which none of the parties challenge. The side letter in this case is either an agreement not to pay money or an agreement limiting a preexisting valid obligation to pay money. The side letter did not implicate the transfer of anything of value from the employer to the union. Central States does not allege that Kraftco paid Vestal for entering into the side agreement. Accordingly, since this is not the type of case Congress intended to reach in enacting section 302, section 302 is not applicable to this case.[16]

[16] Even if section 302 were applicable to this case, it appears that the requirements of the § 302(c)(5) exception are met. Courts, of course, have required strict compliance with § 302(c). *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir.1985). The cases relied on by the district court dealt with *oral* modifications of an agreement which are clearly proscribed by § 302(c)(5). Further, it is clear that the written agreement required by § 302 need not be a collective bargaining agreement as long as it sets out the employer's obligation to contribute. *Gariup v. Birchler Ceiling & Interior Co.*, 777 F.2d 370, 375 (7th Cir.1985); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir.1970); *Doyle v. Shortman*, 311 F.Supp. 187, 195 (S.D.N.Y.1970). The side letter construed with the collective bargaining agreement meets these standards.

Section 302(c)(5) also requires that the "detailed basis" on which payments will be made be specified in writing. The problem in this case arose precisely because the detailed basis was not provided in the agreement negotiated by the parties effective January 1, 1969. Article XII provided that Kraftco would contribute to the pension fund for each employee "upon his becoming a regular employee." The Fund now contends that "regular employee" is defined by Article I(B) which provides:

> New driver salesmen and plant maintenance personnel shall be on trial for a period of ninety (90) days from the date each such employee is placed on the payroll by the Employer, and during such period of ninety (90) days, they may be discharged without notice at the will of the Employer and without the benefit of any provision hereof with respect to discharge set forth in this contract; and other employees shall be on trial thirty (30) days from the date each such employee is placed on the payroll by the Employer, and during such thirty (30) day period they may be discharged without notice and at will of the Employer without the benefit of any provision hereof with respect to discharge set forth in this contract.

The side letter arguably provided a more detailed basis than the collective bargaining agreement since the side letter specified when contributions would begin while the collective bargaining agreement referred to the term "regular employee," which could be defined by implication only.

B.

Central States does not claim that the use of letter agreements is *per se* invalid.,[17] Rather, Central States argues that the failure of the membership to ratify the letter agreement rendered it void. "[T]he claim that the . . . agreement is invalid for failure to obtain ratification involves a simple contractual principle attacking the formation of a contract." *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 756 (3d Cir.1978). "A collective bargaining agreement must be ratified by a union's membership only if the union's constitution, by-laws or rules and regulations create such a requirement. There is no independent requirement in federal law of ratification by a union." *Meyerson v. Contracting Plumbers Ass'n*, 606 F.Supp. 282, 287 (S.D.N.Y.1985); *Confederated Independent Unions v. Rockwell-Standard Co.*, 465 F.2d 1137, 1140 (3d Cir.1972); *Conran v. Great Atlantic & Pacific Tea Co.*, 499 F.Supp. 727, 730 (E.D.Pa.1980). It is clear that the union constitution included a ratification requirement in this case. However, there was testimony in the record by James Dreaden, a member of the union negotiating committee, that in fact the content of the side letter had been presented to the membership and ratified. The district court did not discuss Dreaden's testimony or rule on its credibility or lack thereof. No other union official testified with respect to whether or not the letter had been ratified and Kraftco negotiators expressed a lack of knowledge regarding whether or not ratification was required. In light of the record, the district court erred in not concluding that the letter had been ratified, and that, therefore, Kraftco had not violated the terms of the collective bargaining and trust agreements.[18]

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[17] We have recognized the effect of such letter agreements in the past. *Capitol City Lumber Co., v. NLRB*, 721 F.2d 546, 548-49 (6th Cir.1983), *cert. denied*, 465 U.S. 1029, 104 S.Ct. 1291, 79 L.Ed.2d 693 (1984), and nothing in the collective bargaining agreement in this case bars such agreements. *Turner v. Local Union No. 302, Int'l Brotherhood of Teamsters*, 604 F.2d 1219, 1226 (9th Cir.1979).

[18] The record does not reveal any documentation of the ratification process. Accordingly, we are left with Dreaden's testimony as essentially the sole evidence on this issue.

Even were we to assume that the district court disregarded Dreaden's testimony as not credible, we would still be compelled to reverse since we conclude that the union president had apparent authority to enter into the letter agreement referring to the 36-month payment deferral. Even in the presence of a ratification requirement, "an employer may rely upon the apparent authority of the Union representatives to conclude an agreement, where there is a basis for such reliance." *NLRB v. Truckdrivers, Chauffeurs & Helpers, Local Union No. 100*, 532 F.2d 569, 571 (6th Cir.), *cert. denied*, 429 U.S. 859, 97 S.Ct. 160, 50 L.Ed.2d 137 (1976); *NLRB v. International Union of Elevator Constructors Local No. 8*, 465 F.2d 974, 975 n. 1 (9th Cir.1972) ("When a union representative indicates that he has authority to enter into a binding agreement without membership ratification, and there is an established history of entering into bargaining agreements without such ratification, the Union cannot later contend that ratification is necessary."). *But see Goclowski*, 571 F.2d at 759 ("an employer has no right to rely on the appearance of authority of the bargaining agent if it has knowledge to the contrary").

29 U.S.C. § 185(b) provides that "[a]ny labor organization which represents employees in an industry affecting commerce as defined in this chapter . . . shall be bound by the acts of its agents." Subsection (e) provides that, "[f]or the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." These provisions have been construed as adopting common law standards of agency. *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 217, 100 S.Ct. 410, 414, 62 L.Ed.2d 394 (1979); *Aguirre v. Automotive Teamsters*, 633 F.2d 168, 171 (9th Cir.1980). "[T]he purpose of these provisions was merely to apply the ordinary rules of the law of agency to

labor organizations, notwithstanding resolutions on their part disclaiming responsibility for the action of persons who, in reality, are acting in their behalf." *United Construction Workers v. Haislip Baking Co.*, 223 F.2d 872, 878 (4th Cir.), *cert. denied*, 350 U.S. 847, 76 S.Ct. 87, 100 L.Ed. 754 (1955).

With respect to agency and apparent authority, we have held that common law principles are not to be applied rigidly. Further,

> [t]he question whether an employee is an agent is a question of fact. . . . An employee's conduct may also be attributed to the union if the objector can demonstrate that the union has clothed the employee with apparent authority to act on behalf of the union. . . . At the minimum, the party seeking to hold the Union responsible for an employee's conduct based upon the theory of apparent authority must show that the union cloaked the employee with sufficient authority to create a perception among the rank-and-file that the employee acts on the behalf of the union . . . and that the union did not disavow or repudiate the employee's statements or actions.

Kitchen Fresh, Inc., v. NLRB, 716 F.2d 351, 355 (6th Cir.1983). *See Consolidation Coal Co. v. UMW*, 725 F.2d 1258, 1262-63 (10th Cir.1984); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1295 (9th Cir.), *cert. denied*, 459 U.S. 990, 103 S.Ct. 346, 74 L.Ed.2d 386 (1982) ("A finding that one person is another's agent is generally reviewed as a question of fact, governed by the clearly erroneous standard. . . . The nature and extent of the agent's authority and whether apparent authority existed are also questions of fact."); *North River Energy Corp. v. UMW*, 664 F.2d 1184, 1190-92 (11th Cir.1981); *Shimman v. Frank*, 625 F.2d 80, 94-96 (6th Cir.1980); *Mullett v. NLRB*, 571 F.2d 1292, 1294 (4th Cir. 1978).

The First Circuit has held that a provision in a union's constitution that the local union cannot bind the international without the latter's written consent did not prohibit a finding of apparent authority. *Moreau v. James River-Otis, Inc.*, 767 F.2d 6 (1st Cir.1985).

> Apparent authority cannot be established merely by showing that the agent claimed authority or purported to exercise it, but must be established by proof of something said or done by the principal on which a third person reasonably relied. The burden of proving apparent authority rests on the party asserting that the act was authorized.
>
> . . . Apparent authority can, therefore, be created only by the principal's manifestations to a third party. . . . The agent's representations of authority to a third person, standing alone, are insufficient to create apparent authority in the agent to act for the principal.

Id. at 9-10 (footnotes omitted). *See also Meyerson*, 606 F.Supp. at 288-90. The court warned that "[m]anagement should neither be allowed nor required to scrutinize internal union policies and practices too closely, and, indeed, it may commit an unfair labor practice if it delves too deeply into the union's affairs." *Id.*[19]

[19] It is an unfair labor practice for either an employer or a union to insist on ratification when the parties have reached an otherwise binding agreement. *NLRB v. Seneca Environmental Products*, 646 F.2d 1170 (6th Cir.1981) (company); *NLRB v. Electra-Food Machinery, Inc.*, 621 F.2d 956, 958 (9th Cir.1980) ("internal union matters, including the provision of a union's constitution, cannot relieve an employer from its bargaining duty or affect the validity of collective bargaining agreements"); *NLRB v. Truckdrivers, Chauffeurs & Helpers, Local Union No. 100*, 532 F.2d 569 (6th Cir.1976) (union; neither past practice nor union constitution put company on notice that ratification was a condition precedent to conclusion of binding collective bargaining agreement); *NLRB v. International Union of Elevator Constructors, Local No. 8*, 465 F.2d 974 (9th Cir. 1972) (union); *Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208 (6th Cir. 1967).

Authority may be inferred from custom or practice between the union and employer. *NLRB v. Brotherhood of Painters, Decorators, & Paperhangers, Local Union No. 1385*, 334 F.2d 729, 731 (7th Cir.1964) (history of contract negotiations); *Local 692, United Food & Commercial Workers Union v. Pantry Pride, Inc.*, 522 F.Supp. 1009, 1013 n. 2 (D.Md.1981). Royce McClintock of Kraftco testified that it was a "general practice" of the union and company to enter into side agreements to "better define" the obligations of the parties under the collective bargaining agreement. Donald Spencer testified that he was never informed that past side agreements which altered the terms of the collective bargaining agreement were subject to ratification. Spencer also testified that the effectiveness of the letter agreement was not dependent on ratification. Rose testified that he had no reason to believe that Vestal was without authority to enter into the contested side agreement. Spencer testified that the company declined to question Vestal's authority to enter into the agreement for fear that such might subject the company to an unfair labor practice charge.

Nine side letter agreements are cited by the parties, two of which were executed prior to the letter agreement at issue in this case. In a letter of November 8, 1966, signed by Spencer for Kraftco and the vice president of the union, the parties agreed to changes in the collective bargaining agreement with respect to compensation and bidding of routes. The previous contract is not included in the record; there fore, it is impossible to conclude, as did the district court, that this letter did not diminish the rights of union members. 589 F.Supp. at 1074. A letter agreement of February 1, 1968, signed by company and union representatives, eliminated the classification of shipping clerk and created the classification of head boxman and set out the position's duties and

qualifications.[20] These two agreements involved substantive changes in the collective bargaining agreement and there is no evidence that either was ratified by the union membership before being adhered to by the union and the company.

Accordingly, it is clear from the testimony of Kraftco employees and the conduct of the union and fund that none of the parties considered ratification a prerequisite to the validity of the side letter agreement. Further, the union's entry into and compliance with the prior letter agreements constituted representations by the union to the employer that union officials were authorized to enter into side letter agreements modifying the collective bargaining agreement without ratification.[21] Therefore, the district court's findings of fact to the contrary are clearly eroneous.[22]

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[20] Subsequent agreements of June 20, 1973, January 10, 1977, August 4, 1977, September 6, 1977, February 14, 1978 and March 28, 1980 dealt with the status of particular employees. A letter of August 15, 1977 agreed to bidding procedures and a letter of April 11, 1978 dealt with use of union transport drivers as relief drivers on non-union routes.

[21] Central States also argues that the letter agreement did not apply to similar provisions in the later-negotiated ice cream plant contract and in subsequent agreements of both milk plant and ice cream plant employees. The letter agreement, of course, was not an alteration or modification of the terms of the collective bargaining agreement, but merely a memorandum of understanding between the parties about the meaning of the term "regular" or "eligible" employee used in the labor contracts. As such, the overwhelming evidence at trial was that the letter applied to all agreements negotiated by the local with Kraftco. This view is supported by the fact that the union raised no objection to Kraftco's contribution practices although several new agreements were negotiated before this action was instituted. *See Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1520 n. 13 (9th Cir.1985).

[22] Since we conclude that the district court erred in granting judgment in plaintiffs' favor, we need not address the alternative estoppel argument proffered by Kraftco.

Accordingly, the judgment of the district court is REVERSED.

ENGEL, Circuit Judge, concurring in result.

I concur in reversal but for the reasons stated by Judge Guy in his separate concurrence, which I join. I am particularly concerned with Judge Contie's reliance upon the testimony of James Dreaden. While the trial judge did not make a specific credibility finding with respect to the testimony of Dreaden, it is apparent from his findings that he rejected Dreaden's testimony that the Union membership knew of and ratified the letter agreement. Since by the time he testified at the trial, Dreaden had left his position as a member of the Kraftco bargaining unit and joined management, the trial judge's apparent decision not to credit his testimony has some support based upon the witness' change in interest. I do not believe we may appropriately rely upon the accuracy of Dreaden's testimony given some years later and after he had assumed a different role and hence had acquired different loyalty, at least where the district judge who heard his testimony apparently did not. This same problem was correctly noted by United States District Judge DeMascio in his special concurrence in the original panel decision.

RALPH B. GUY, Jr., Circuit Judge, concurring in result.

Although I concur in the decision to reverse the district court, I cannot concur in two of the several conclusions which led to that result. The first is that found in part III A of Judge Contie's opinion to the effect that § 302 is not applicable here. Given the purpose of this legislation and its remedial nature, I believe the district court correctly found § 302(c)(5)(B) to be applicable. Simply put, § 302(a) prohibits employers from giving money or other things of value to labor unions except in certain well defined instances. One such instance, set forth in § 302(c)(5)(B), is where the money is to be used as a trust fund for the sole and

exclusive benefit of the employees. Recognizing, however, that to require only the stating of a purpose without more would leave the door open for abuse, Congress also mandated that "the detailed basis on which such payments are to be made is specified in a written agreement . . . ."

The district court finding what it believed to be an unratified and unauthorized side letter agreement concluded that this agreement in combination with the collective bargaining agreement would not constitute the "detailed basis" for the making of payments required by the statute. The majority conclusion that the side letter agreement was an agreement "not to pay money" and "did not implicate the transfer of anything of value from the employer to the union." I think misperceives the trial judge's holding. The trial judge did not rule that the side letter violated § 302 but, rather, that the nature and manner of entering into the side letter agreement violated the "detailed basis" requirement of § 302(b). Although this would be a conclusion of law reviewable *de novo* by this court, this is not the basis on which the majority rejects the applicability of § 302. I am nonetheless able to concur in the result because of footnote 16 to the majority opinion which sets out an alternative and, to me at least, sounder basis for rejection of the trial court's conclusion on this issue.

I am also uncomfortable with the majority's rejection of what is at least an implicit finding by the trial judge that the side letter agreement was never ratified as the union constitution required. This would be a factual finding and, as such, is only reversible if clearly erroneous. I would readily agree that the record is underdeveloped on this point, but that is the fault of the parties not the trial judge, and we are required to give the trial judge the benefit of the doubt on factual findings. Fed.R.Div.P. 52(a). Here again, however, the

majority's alternative theory on the apparent authority of the union president to bind the union even without ratification appears supportable both by custom and practice as well as decisional authority.[1]

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[1] I also prefer to concur on the basis of the apparent authority rationale because under that theory one need only ascertain the intent of the parties making the side letter agreement and the record amply supports that the parties intended that the agreement was to continue unless and until changed. The ratification argument, on the other hand, implicates the troublesome question of whether the union membership was intending to ratify an amendment in perpetuity or only until the next negotiating session. The answer to this question is not ascertainable from the record.

APPENDIX D

Amended Judgment of the Court of Appeals

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**NOS. 84-5518
84-5868**

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND DANIEL J. SHANNON,
Plaintiffs-Appellees,

v.

KRAFTCO, INC., d/b/a SEALTEST FOODS DIVISION,
Defendant-Appellant.

KRAFT, INC.,
Plaintiff-Appellant,

v.

LOCAL UNION 327, TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS,
Defendant-Appellee.

Before: LIVELY, Chief Judge; ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE*, KRUPANSKY, GUY, NELSON, RYAN and BOGGS, Circuit Judges.

AMENDED JUDGMENT
November 5, 1986
(Filed: Sep. 2, 1986)

UPON CONSIDERATION of the petition for rehearing en banc and the supplemental briefs.

THIS CASE came on to be heard and was argued by counsel.

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* On July 1, 1986 Judge Contie took senior status.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the District Court in this case be and the same is hereby reversed.

Each party is to bear its own costs on appeal.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, *Clerk*

RE-ISSUED AS MANDATE: 11/05/86

COST: none

APPENDIX E

Order of the Court of Appeals Denying Petition for Rehearing *En Banc*

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NO. 84-5518/5868

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND DANIEL J. SHANNON,
Plaintiffs-Appellees,

v.

KRAFTCO, INC., d/b/a SEALTEST FOODS DIV.,
Defendants-Appellants

KRAFT, INC.,
Plaintiff-Appellant,

v.

LOCAL UNION 327, TEAMSTERS, CHAUFFEURS, HELPERS AND TAXICAB DRIVERS,
Defendant Appellee

BEFORE: JONES and CONTIE, Circuit Judges, and DeMASCIO* United States District Judge

ORDER
(Filed: Feb. 10, 1986)

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

* Hon. Robert E. DeMascio sitting by designation from the Eastern District of Michigan.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, *Clerk*

APPENDIX F

Order of the Court Granting Petition for Rehearing *En Banc*

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

NOS. 84-5518/5868

CENTRAL STATES SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND
AND DANIEL J. SHANNON,
Plaintiffs-Appellees,

v.

KRAFTCO, INC., d/b/a SEALTEST
FOODS DIV.,
Defendants-Appellants

KRAFT, INC.,
Plaintiff-Appellant,

v.

LOCAL UNION 327, TEAMSTERS,
CHAUFFEURS, HELPERS AND TAXICAB
DRIVERS,
Defendant-Appellee

BEFORE: LIVELY, Chief Judge, ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, JONES, CONTIE, KRUPANSKY, WELLFORD, MILBURN, GUY and NELSON, Circuit Judges

ORDER

(Filed: Feb. 19, 1986)

Upon consideration, it is ORDERED that the order filed February 10, 1986 in this case be and hereby is vacated.

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is further ORDERED that the previous decision and judgment of this Court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, *Clerk*

APPENDIX G

Relevant Provisions of Collective Bargaining Agreements and the "Side Letter Agreement" of June 26, 1969

SEALTEST FOODS, NATIONAL DAIRY PRODUCTS CORPORATION

AGREEMENT

Local Union No. 327

☆

January 1, 1966 to December 31, 1968

20

AGREEMENT

The TEAMSTERS, CHAUFFEURS, HELPERS & TAXICAB DRIVERS, LOCAL UNION NO. 327, of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, hereinafter referred to as the Union, and SEALTEST FOODS, NATIONAL DAIRY PRODUCTS CORPORATION, hereinafter referred to as the EMPLOYER or COMPANY, hereby agree to be bound by the following terms and provisions covering wages and working conditions:

ARTICLE I

Recognition

A. The Union shall be the sole representative of the classifications of employees engaged in the handling and first processing of fluid milk and dairy products processed in the Employer's plant at 1401 Church Street, Nashville, Tennessee, covered by this Agreement, as hereinafter set forth, in collective bargaining with the Employer.

B. New driver salesman and plant maintenance personnel shall be on trial for a period of ninety (90) days from the date each such employee is placed on the payroll by the Employer, and, during such period of ninety (90) days, they may be discharged without notice at the will of the Employer and without the benefit of any provision hereof with respect to discharge set forth in this contract; and other employees shall be on trial thirty (30) days from the date each such employee is placed on the payroll by the Employer, and during such thirty (30) day period, they may be discharged without notice and at will of the Employer without the benefit of any provision hereof with respect to discharge set forth in this contract. Extra men employed by the Employer from time to time may be discharged in the sole and absolute discretion of Employer, without notice,

any time prior to the expiration of a period of ninety (90) days, provided, however, that when such extra man serves any route without being accompanied by an instructor or superior, he shall receive the same compensation that the regular driver salesman on that route would have received for serving it, provided, further, that when an extra man is available and already employed by Employer and a vacancy occurs on a route, no employee, who has been employed for a shorter time than such extra man, will be allowed to fill such vacancy until such extra man is given a trial on such route and discharged by Employer.

* * *

(10)

* * *

ARTICLE XII

Health and Welfare and Pension Insurance

Effective February 1, 1966, the Employer shall contribute to the Health and Welfare Fund of Local Union 327, the sum of $4.30 per week for each employee who has been on the payroll for a period of ninety (90) days or more.

Effective January 1, 1967, the contribution shall be increased to $4.80 per week. Effective January 1, 1968, the weekly contribution shall be increased to $5.30 per week, per employee.

By the execution of this Agreement, the Employer authorizes the formation of a proper trust agreement necessary for the administration of such fund, and under such agreement hereby waives all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the

Employer shall continue to make the required contributions for a period of four (4) months. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than twelve (12) months. If an employee is granted a leave of absence, the Employee shall pay prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

The Employer shall pay to the Central States Southeast and Southwest Pension Fund, by check mailed to the American National Bank, Box 1431, Chicago, Illinois, the sum of four dollars ($4.00) per week, for each employee covered by this Agreement who has been on the payroll thirty-six (36) months or more. The thirty-six months does not apply to any employees on which the Company has already made contributions. Beginning June 1, 1968 the Company will contribute the sum of $5.00 (five dollars) per week for each employee covered by this Agreement. Effective December 1, 1968, this amount shall be increased to six dollars ($6.00) per week.

The Employer agrees to continue to make said contribution for a period of four weeks for an employee who is absent because of sickness or off-the-job injury. And further the Employer agrees to continue to make contributions for a period of twelve (12) months for an employee who is absent because of on-the-job injury. Employees who work either temporarily or in cases of emergency under the terms of this agreement shall not be covered by the provisions of this article.

* * *

(32)

time as they are acquired on a drop shipment basis. Transport drivers shall receive a basic hourly rate of pay of $3.25 from February 1, 1966 for the first forty (40) hours worked in any one work week plus one and one half (1½) for all hours worked over forty (40) in any one work week. The eight (8) hour guarantee or the night premium does not apply to transport drivers.

Effective 1-1-67 — rate increased to $3.32

Effective 1-1-68 — rate increased to $3.39

20. The Employer agrees to compensate the night mechanic at the garage at his regular rate of pay during his thirty (30) minute lunch period if required to stay on the job.

21. Effective January 1, 1967 all wholesale routes shall normally be run by only the driver-salesmen, or route supervisors and superintendents unless written permission is given by the Company.

22. Effective August 1, 1966 the employees who load the wholesale and retail trucks shall be classified as checkers and loaders.

23. DISCRIMINATION CLAUSE.

There shall be no discrimination by either party to this Agreement because of race, color, creed, sex or national origin.

24. This Agreement shall become effective on January 1, 1966 and shall continue through December 31, 1968, and from year to year thereafter subject to the right of either party to change same by delivering to the other party written notice of the desire to change the above sixty (60) days prior to the agreed expiration date.

This Agreement acknowledged and signed by and between the Union and the Company on this 1st day of April 1966 in four counter parts.

FOR THE UNION:
JAMES R. CRAIGHEAD

Vice President and Business
Representative
THOMAS ADAMS

Business Agent
FOR THE COMPANY:
T. H. ROSE
D. H. SPENCER
L. M. JONES

Appendix G

SEALTEST FOODS

Division of Kraftco Corp.

AGREEMENT

LOCAL UNION NO. 327

January 1, 1969

to

December 31, 1971

AGREEMENT

The TEAMSTERS, CHAUFFEURS, HELPERS & TAXICAB DRIVERS, LOCAL UNION NO. 327, of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, hereinafter referred to as the Union, and SEALTEST FOODS, Division of KRAFTCO CORPORATION, hereinafter referred to as the EMPLOYER or COMPANY, hereby agree to be bound by the following terms and provisions covering wages and working conditions:

ARTICLE I

Recognition

A. The Union shall be the sole representative of the classifications of employees engaged in the handling and first processing of fluid milk and dairy products processed in the Employer's plant at 1401 Church Street, Nashville, Tennessee, covered by this Agreement, as hereinafter set forth, in collective bargaining with the Employer.

B. New driver salesman and plant maintenance personnel shall be on trial for a period of ninety (90) days from the date each such employee is placed on the payroll by the Employer, and, during such period of ninety (90) days, they may be discharged without notice at the will of the Employer and without the benefit of any provision hereof with respect to discharge set forth in this contract; and other employees shall be on trial thirty (30) days from the date each such employee is placed on the payroll by the Employer, and during such thirty (30) day period, they may be discharged without notice and at will of the Employer without the benefit of any provision hereof with respect to discharge set forth in this contract. Extra men employed by the Employer from time to time may be discharged in the sole and absolute discretion of Employer, without notice, any time prior to the expiration of a period of ninety (90) days, provided, however, that when such extra man serves any route without being accompanied by an instructor or superior, he shall receive the same compensation that the

regular driver salesman on that route would have received for serving it, provided, further, that when an extra man is available and already employed by Employer and a vacancy occurs on a route, no employee, who has been employed for a shorter time than such extra man, will be allowed to fill such vacancy until extra man is given a trial on such route and discharged by Employer.

* * *

(9)

* * *

ARTICLE XII

Pension Plan

The Employer shall pay to the Central States Southeast and Southwest Pension Fund, by check mailed to the American National Bank, Box 1431, Chicago, Illinois, the sum of six dollars ($6.00) per week, for each employee covered by this Agreement upon his becoming a regular employee. Beginning June 1, 1971, the Company will contribute the sum of seven dollars ($7.00) per week for each employee covered by this Agreement. Effective December 1, 1971, this amount shall be increased to eight dollars ($8.00) per week.

The Employer agrees to continue to make said contribution for a period of four weeks for an employee who is absent because of sickness or off-the-job injury. And further the Employer agrees to continue to make contributions for a period of twelve (12) months for an employee who is absent because of on-the-job injury. Employees who work either temporarily or in cases of emergency under the terms of this agreement shall not be covered by the provisions of this article.

The Employer recognizes the authority of the acting trustees and their successors, appointed by the Employer and the Union, to administer the above named Pension funds in accordance with the Trust Agreement under which

such trustees have been appointed and are acting and the rules and regulations adopted by them; but Employer's obligation shall be and hereby is limited to the foregoing weekly contributions.

A. Insurance

The Company has agreed to place all employees under their own insurance plan.

B. Injury on Job and Sickness

Whenever any employee is injured on the job, such employees will be paid at such employee's regular rate of compensation for each day of the first week following such injury and not covered by workman's compensation benefits such employee is required to remain away from work by the Company doctor, as stated in the doctor's certificate which the employee must present to the Company provided that the Company's obligations hereunder shall not exceed one week's compensation. Upon illness of any regular employee, covered under this Agreement, the Employer will pay the first six (6) days at his prevailing base rate of pay on his first sickness of each contract year and these days shall be accumulative up to a total of fourteen (14) days. On the second and succeeding sickness during the yearly period, the benefits as prescribed under the prevailing insurance coverage in effect will apply. At the expiration of these six (6) days, the sick benefit payments under the effective Insurance Plan shall begin for the remaining days of illness and the employee agrees to furnish the Employer with a certificate from the attending physician, if required. Also these sick benefits are over and above the two (2) days off allotted to driver-salesmen per month.

* * *

(34)

22. Effective August 1, 1966, the employees who load the wholesale and retail trucks shall be classified as checkers and loaders.

23. **Discrimination Clause**

The Company and the Union recognize the rights, freedom and dignity to which each individual worker is entitled and intends that jobs in the company be filled by the best qualified individual available without regard to race, creed, color, sex, age or national origin.

24. This Agreement shall become effective on January 1, 1969, and shall continue through December 31, 1971, and from year to year thereafter subject to the right of either party to change same by delivering to the other party written notice of the desire to change the above sixty (60) days prior to the agreed expiration date.

This Agreement acknowledged and signed by and between the Union and the Company on this 27 day of June, 1969 in four counter parts.

FOR THE UNION:
DON VESTAL

____

____

FOR THE COMPANY:
D. H. SPENCER

____

____

COLLECTIVE BARGAINING AGREEMENT COVERING ICE CREAM PRODUCTION AND MAINTENANCE WORKERS: 1969-1971

Sealtest Foods, Ice Cream Division, Nashville, Tennessee (hereinafter referred to as the Employer or Company) and Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union 327, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union) (sic) agrees to be bound by the terms and provisions of this Agreement.

ARTICLE I. RECOGNITION

A. The Employer agrees to recognize the Union as the exclusive bargaining representative of all the employees in the following units: Included: All production and maintenance employees employed by the Employer, 1156 Broad Street, Nashville, Tennessee, plant.

B. If any portion of this contract is found to be in violation of the Federal or State law then the portion so found to be in violation shall be limited or restricted so as to comply with the law, but the provisions shall not affect the validity of the remainder of the contract.

C. The Union shall be the sole and exclusive bargaining agent for all employees for whom the Union was certified as representative in National Labor Relations Board Case No. 26-RC-2559.

New employees shall be hired on a thirty (30) day trial basis, during which time they may be discharged or suspended without recourse. After thirty (30) days, they shall be placed on the regular seniority list. With maintenance employees, the probationary period shall be for ninety (90) days.

ARTICLE XXI. BULLETIN BOARD

The Company will supply a bulletin board for the use of the Union in a convenient area. The Union agrees that the material to be posted on the said board will be limited to notice of Union meetings, Union recreational and social affairs.

ARTICLE XXII. PENSIONS

The Employer shall pay to the Central States Southeast and Southwest Pension Fund, by check mailed to the American National Bank, Box 1431, Chicago, Illinois, the sum of four dollars ($4.00) per week for each employee covered by this Agreement upon his becoming a regular employee. Effective April 15, 1971, this amount shall be increased to five dollars ($5.00). Effective October 15, 1971, this amount shall be increased to six dollars ($6.00) per week.

The Employer recognizes the authority of the acting trustees and their successors, appointed by the Employer and the Union, to administer the above named Pension funds in accordance with the Trust Agreement under which such trustees have been appointed and are acting and the rules and regulations adopted by them, but Employer's obligation shall be and hereby is limited to the foregoing weekly contributions.

ARTICLE XXIII. HEALTH AND WELFARE

Effective the first full week after the signing of this contract, the Employer shall contribute to the Health and Welfare Fund of Local Union 327, the sum of six dollars ($6.00) for each employee who has been on the payroll for a period of ninety (90) days or more.

Effective January 1, 1971, the contribution shall be increased to seven and one-half dollars ($7.50) per employee.

By the execution of this Agreement, the Employer authorizes the formation of a proper trust agreement necessary for the administration of such fund, and under such agreement hereby waives all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority, but employer's obligation ends when they make the contribution.

ARTICLE XXIV. HOLIDAYS

New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day or days celebrated as such shall be considered holidays. The employees shall be paid a full day's pay for each such holiday unless such employee is absent the last preceeding work day, or the first work day following the holiday; however, proven sickness in either of the above exceptions shall not disqualify an employee for holiday pay.

Any employee required to work on any such holiday and he lays off on that day without the Employer's prior consent shall not receive any pay for such day.

Holiday pay as such shall be used in making up the weekly guarantee. Premium pay for holiday worked will not be used in making up the weekly guarantee, but will be in addition to the weekly guarantee. If a holiday falls on an employee's off day, the Employer will pay such employee an extra day's pay or give him another day off in lieu of pay. Should any of the above named holidays fall on Sunday, the following Monday shall be observed as a legal holiday.

If a holiday falls within a thirty (30) day period after a regular employee is put on layoff status, the employee shall be paid for such holiday. If a regular employee performs any work on a holiday, he shall be paid one and one-half (1½) the applicable hourly rate for such work performed in addition to the regular holiday pay for hours actually worked or with a minimum of four (4) hours.

ARTICLE XXV. FUNERAL LEAVE

The Employer agrees to compensate at the base rate of pay for as many as two (2) days, any and all employees who are off on account of any death in his or her immediate family. The immediate family is hereby defined to mean spouse, children, mother, father, sister, brother, mother-in-law, father-in-law, brother-in-law, sister-in-law, and grand parents, and it is further agreed that any employee may be off on account of other deaths occurring in his or her family, without pay. No employee who works while there is a death in his immediate family shall be compensated other than at his regular rate of pay and shall receive no premium pay.

It is further agreed that the compensable day or days must fall within the employee's regularly scheduled work week.

ARTICLE XXVI. JURY DUTY

The amount received for jury duty by an employee forced to serve after pleading any and all legal excuses, or exemptions, shall be supplemented so that the sum received for jury service and from such supplemental pay will equal what such employee would have received in working during such period of service.

ARTICLE XXVII. WAGE SCHEDULE

The wage schedule and classifications attached hereto shall become a part of this Agreement.

ARTICLE XXVIII. EXPIRATION OF CONTRACT

This Agreement shall be in effect from May 13, 1969 through November 15, 1971, and shall continue from year to year thereafter unless either party serves notice in writing to the other party sixty (60) days prior to agreed expiration date of a desire to terminate or amend this Agreement.

IN WITNESS WHEREOF, the said parties have caused duplicate copies hereof to be executed by their duly authorized representatives this 15th day of August 1969.

FOR THE UNION:

(s) Frank Reed

FOR THE COMPANY:

(s) D. H. Spencer

[Letterhead of Sealtest Foods]

June 26, 1969

Mr. Don Vestal
President & Business Manager
Local Union 327
Teamster, Chauffeurs, Helpers & Taxi Cab Drivers
1006 Russell Street
Nashville, Tennessee

Dear Mr. Vestal:

As per our conversation of June 26, 1969, and our agreement of such time, Sealtest Foods will continue to commence regular pension payments on our employees when such employees have been in our employ for a period of thrity-six (sic) (36) months. Said pension payments shall then continue as stipulated in our present labor agreement.

If you concur in this agreement, please sign one copy and return to us.

We realize this may require some possible discussion and adjustment for some specific individuals during the life of our labor agreement.

Sincerely yours,
SEALTEST FOODS
(s) T. H. Rose

(s) Don Vestal, Pres. & Business Mgr.
Date: June 27, 1969

D. H. Spencer

D.V.
Attachment

APPENDIX H

Complaint and Relevant Exhibits

(Filed: April 11, 1978)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CENTRAL STATES SOUTHEAST and SOUTHWEST AREAS PENSION FUND, and DANIEL J. SHANNON,
Plaintiffs,

vs.

Civil Action No. 78-3135 NA.CV

SEALTEST FOODS
Defendant.

COMPLAINT

This action arises under the Labor Management Relations Act as amended and the Employee Retirement Income Security Act as amended, and as hereinafter more fully appears. Jurisdiction is founded upon diversity of citizenship under 28 U.S.C. 1332; §301(a) of the Labor Management Relations Act as amended, 29 U.S.C. 185(a); and §502 of the Employee Retirement Income Security Act of 1974 as amended, 29 U.S.C. 1132. The matter in controversy, exclusive of interest and costs, exceeds $10,000.00 and is between plaintiffs who are citizens of the State of Illinois and defendants who are citizens of the State of Tennessee.

The plaintiff, Central States Southeast & Southwest Pension Fund is an employee benefit plan within the meaning of §3(1)(2)(3)(21), 405 (C)(1)(B) and 502 of the Employee Retirement Income Security Act of 1974 as amended, 29 U.S.C. §1002(1)(2)(3)(21), 1109(C)(1)(B) and 1132 and brings this action on behalf of its trustees, participants and beneficiaries. The Central States Southeast and Southwest Pension Fund maintains its offices and principal place of business in the State of Illinois.

The plaintiff, Daniel J. Shannon, is the Executive Director of the Central States Southeast and Southwest Pension Fund and is a fiduciary of the plaintiff fund within the meaning of the Employee Retirement Income Security Act, 29 U.S.C. 1002 *et seq*. The plaintiff, Daniel J. Shannon, has been authorized by the trustees of the plaintiff fund to bring this litigation and to seek the remedy prayed for on behalf of the fund.

The defendant, Sealtest Foods, is a corporation doing business in the State of Tennessee with its principal office and place of business in Nashville, Tennessee, and is subject to service of process through its agent for service of process, C. T. Corporation System, 1412 Hamilton National Bank Building, Knoxville, Tennessee 37902.

The defendant, Sealtest Foods, is an employer within the meaning of the Labor Management Relations Act, 29 U.S.C. 151 *et seq*. and is engaged in an industry affecting commerce within the meaning of §3(5)(11)(12) and (14) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(5)(11)(12) and (14).

The plaintiff fund is administered and organized pursuant to the terms and provisions of an agreement and declaration of trust pertaining thereto. The said fund has been established pursuant to collective bargaining agreements heretofore entered into between Sealtest Foods and the International Brotherhood of Teamsters, Chauffeurs, Helpers and Taxicab Drivers Local Union 327 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. By virtue of provisions contained in said collective bargaining agreements to which the defendant Sealtest Foods is bound, said defendant did promise and become obligated to make contributions to the plaintiff fund in specified amounts.

The defendant, Sealtest Foods, has failed and refused to make certain of the required payments as required on their respective due dates. As a result of such failure and refusal the fund may be required to refuse the employee beneficiaries of said fund, and for whom required contributions have not been made, the benefits provided for thereunder, thereby causing to such employee beneficiaries substantial and irreparable damage. Further, the fund may be required to provide to the employees of the defendant, Sealtest Foods, benefits provided thereunder notwithstanding the failure of said defendant to make required contributions thereto, thereby reducing the corpus of plaintiff fund and endangering the right of employee beneficiaries thereunder on whose behalf contributions were to have been made, all to their substantial and irreparable injury. The plaintiff fund, in its behalf and on behalf of all employees for whose benefit the fund has been established, have requested the defendant, Sealtest Foods, to perform its obligations but the defendant has failed and refused to perform as hereinbefore alleged. As a result of said failure and refusal, defendant Sealtest Foods is delinquent in requiring contributions to the fund in the amount of $146,000.00.

The plaintiffs herein are without an adaquate remedy at law and will suffer immediate and continuing and irreparable loss and damage unless the defendants herein are ordered specifically to perform all obligations on defendant's part required to be performed under the collective bargaining agreements, and unless and until said defendant is restrained from continuing to refuse and perform as thereunder required.

Wherefore, plaintiffs pray:

1. That the defendant herein be decreed to pay the trustees of the fund all sums determined to be due, together with an additional sum equal to ten per cent (10%) thereof as cost of collections.

2. That the defendant be decreed to pay to the trustees of the fund all sums determined to be due, together with an additional sum as equals the earnings that would have accrued to said payments had the same been timely made.

3. That the defendant be specifically required to perform and continue to perform all obligations on its part undertaken pursuant to the collective bargaining agreements.

4. That the defendant be decreed to pay all costs attendant to this proceeding, and further be required to pay to the trustees of the fund their reasonable attorney's fees.

5. That the plaintiffs have such other and further relief as the court may deem to be just and equitable.

Respectfully submitted.

CECIL D. BRANSTETTER
R. JAN JENNINGS
Branstetter, Moody & Kilgore
200 Church Street
Nashville, Tennessee 37201

COUNTY OF DAVIDSON
STATE OF TENNESSEE

AFFIDAVIT

Now comes D. H. Spencer who, first being duly sworn, deposes and says:

1. I have been employed by Kraft, Inc. and its corporate predecessors since April 1, 1950.

2. I have personally participated in negotiations with Local 327 for all collective bargaining agreements since 1965.

3. In the collective bargaining agreement which became effective January 1, 1966, Article XII of that agreement provided that pension contributions would not be made for employees with less than 3 years' service as is shown in Attachment 1. The reason of Local 327 and Kraft, Inc. for agreeing to commence pension contributions after 3 years' service rather than a shorter period was to provide more money in the form of direct wages rather than less money resulting from pension contributions of the numerous short-term employees who would never realize any retirement income from the pension fund in any event.

4. During negotiations for the collective bargaining agreement signed in June, 1969, retroactive to January 1, 1969, Local 327 President and Business Manager Don Vestal stated that the 36-month provision would have to be removed from the collective bargaining agreement, but that he would enter into a Letter Agreement with the Company continuing the 36-month provision in effect. This Letter Agreement permitted Local 327 to handle its apparent "political purposes" and at the same time accomplish more for its members in the form of greater straight time wage

rates with the payment of money from Kraft, Inc. which otherwise would have gone for pension contributions, many employees for whom contributions would be made being short-term employees.

5. Pursuant to these discussions, Article XII of the new collective bargaining agreement (Attachment 2) deleted the language concerning the 3-year provision, and I drafted a letter for the signature of T. H. Rose (Attachment 3) which he signed and which I personally took to Mr. Vestal, who also signed it.

6. The language of Article XII remained unchanged from that agreement forward. It was the understanding of the Company in 1969 that the Letter Agreement continued in effect without alteration or expiration, and the silence and acquiescence of both the Pension Fund and the Local confirm our belief that the intent of the parties had been to provide an agreement which ran in perpetuity.

7. During the course of negotiations which led to the present collective bargaining agreement, which became effective January 1, 1978, the subject of pension contributions arose and I brought the Letter Agreement to the attention of the Local again. As a result of the discussions on the subject, the Local insisted, and the Company agreed, that commencing January 1, 1978, pension contributions would be made on behalf of "regular employees" as that term is defined in the collective bargaining agreement.

8. Copies of Article XII of the 1971, 1975 and 1978 collective bargaining agreements are attached as Attachments 4, 5, and 6, respectively.

9. The Company and the Union also have in effect a Letter Agreement entered into during the last contract term, a copy of which is attached as Attachment 7, which con-

tinues to be observed by both parties despite the expiration of the collective bargaining agreement which was in effect at the time that Letter Agreement was entered into.

10. At all pertinent times, the Company has submitted to both the Local and the Fund a list of all employees on whose behalf contributions are being made. The Local also has, of course, seniority rosters which are updated by the Company on a semi-annual basis.

(s) D. H. Spencer

Sworn to and subscribed before me
this 17th day of September, 1979.
(s) Joyce K. Smithson
Notary Public
My Commission Expires: 11/16/80

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

AFFIDAVIT

Now comes DON VESTAL who, first being duly sworn, deposes and says:

1. I was President and Business Manager of Local Union 327, Teamsters, Chauffeurs, Helpers and Taxicab Drivers in June 1969 and was the representative of Local 327 in handling the negotiations with Sealtest Foods for a collective bargaining agreement. For years prior to 1969, employers had been required to make contributions to the pension fund only after an employee had been employed for thirty six months. In 1969, local unions were urged to lower the three year period before contribution was to be made to the ordinary probationary period. Sealtest Foods and I, as the bargaining representative of the employees, did not think that requiring employers to make contributions for short term employees was in the best interest of the bargaining unit and we negotiated a separate agreement with Sealtest Foods.

2. Attached to this affidavit is a true, correct, unaltered and complete photocopy of the agreement relating to pensions which Sealtest Foods and I, as the official representative of Local Union 327, negotiated. This agreement was understood by the company and the union to be of an indefinite duration and it was further agreed and understood that it would continue in full force and effect until such time as the union and the company specifically and expressly changed the pension contribution procedures through future negotiations. Sealtest Foods and I, as the official representative of Local Union 327, agreed and understood that the basic collective bargaining agreement which we were negotiating at the same time would contain language to the effect that contribution would be made by the company imme-

diately following an employee's probationary period, but it was our intention, absolutely and without doubt, that no payments would be made pursuant to such language and that the attached agreement would control and would determine the contributions to be made by Sealtest Foods. We further understood that the same language relating to pension contributions which would be in the basic collective bargaining agreement beginning 1969 would continue in future agreements until such time as it might be changed because of the urging of the International Union. Local unions, for obvious reasons, don't like to get into conflicts with the International. In any event, the company and I, as official representative of Local Union 327, fully understood and agreed that the company's contributions would be determined by the attached agreement as to when the company would commence contributions for an employee and, thereafter, payments would be made for the employee with more than three years service at the rate specified in whatever labor agreement was presently in effect at the time of the contributions. It was absolutely, and without doubt, the intention of Sealtest Foods and I, as the official representative of Local Union 327, that the attached agreement would continue to control the obligations of the company to make contributions to the pension fund throughout the term of the basic labor agreement negotiated in 1969 and throughout the subsequent terms of any future basic labor agreements until such time as the parties expressly and specifically changed the contribution requirements through negotiations between Sealtest Foods and Local Union 327.

(s) Don Vestal

Sworn to and subscribed before
me this 15th day of June, 1979.

(s) Terry M. Brown
Notary Public

My commission expires:

November 13, 1979

STATEMENT OF J. YARBROUGH

Account No. 7177000-1204; Sealtest Foods in Nashville, Tennessee.

A controversy and dispute concerning the above-referenced account was reviewed by the undersigned as Opertations (sic) Director of the Fund for a decision upon announcement that a suit for collection of arrearages in the account would soon go to trial. Mr. Cecil Branstetter, counsel for the Fund, undersigned the background leading to the controversy and dispute:

1. Sealtest Foods operates an ice cream plant and a milk plant in Nashville, Tennessee and first began dealing with the Fund in 1960 when a participation agreement was executed between Sealtest and Teamsters Local 327. Thereafter, contributions were made on behalf of Sealtest employees with 36 or more months of service until 1978. During early 1978, the Fund became aware that the collective bargaining agreements between Sealtest and Teamsters Local 327 since at least 1969 had required pension contributions for employees with either 30 days or 90 days of service depending upon job classification. Notification to the Fund was by letter dated March 27, 1978.

After learning of the arrearages, Sealtest verbally agreed to make future contributions in compliance with the 30 day and 90 day service requirements, but Sealtest refused to pay arrearages which had accrued from a failure to make such contributions in the past. As a result, in April of 1978, and pursuant to Article III, Section 4 of the Trust Agreement, the Fund initiated prosecution of the above-referenced suit for collection of the arrearages from Sealtest. During the regular course of the collection suit, a pre-trial order was prepared and submitted to the Court. A duplicate of this pre-trial

order was submitted ot the undersigned for review. Exhibit 17 thereof is a letter executed by Mr. Don Vestal, a former business agent for Teamsters Local Union 327; Sealtest places primary reliance upon this letter in defense of the suit for collection of arrearages. The undersigned was requested by Mr. Cecil Branstetter to review in its entirety, the pre-trial order with all exhibits.

Upon a consideration of the background information presented by Mr. Cecil Branstetter, and a review of the pre-trial order with the exhibits, the undersigned requested internal reports concerning an audit of the Sealtest account, collection procedures of the Fund, and an additional report concerning the effect of non-compliance with the various collective bargaining agreements between Sealtest and Teamsters Local 327 upon the actuarial soundness of the Fund and/or retirement benefits for Sealtest employees. As a result, the following reports were received:

1. Mr. George Psaras, Director, Operations Accounting reported on the results of an audit of the Sealtest account which was conducted in August of 1978, and several dates thereafter. The Auditing Department reported that results of the audit confirmed that stipulated amounts of arrearages which are contained in the pre-trial order are correct, and in accordance with Article III, Section 4 of the Trust Agreement any monies received as a result of the suit be applied first to any interest due and then to oldest unpaid balance of contributions due from Sealtest.

2. Mr. Edward Lienhard, Manager, Field Employer Audit Department, reported on collection procedures of the Fund. Mr. Lienhard reported that the Fund receives contributions from approximately 15,000 employers each month and because of the large number of payments received, is unable to routinely audit every year each

and every employer account to determine arrearages. Rather, the Fund relies upon statements made by each employer which accompany each monthly statement and which certify the accuracy of payments made, and the Fund also relies upon complaints and information supplied by employers and/or local unions (such as the letter dated March 27, 1978 which was received pertaining to the Sealtest account) in order to determine if employers are making the required contributions. In addition, Mr. Lienhard reported the Fund routinely checks for variances from established average levels of an employer's employees and amounts regularly contributed by employers; and, an occasional random audit of an employer's account. In addition, Mr. Lienhard reported employees seeking pension benefits are often a source of information which uncovers delinquent employer contributions as an employee will often request benefits which are thought to be due, but for which an employer has improperly failed to make required contributions on behalf of the employee. One such incidence was noted with respect to the Sealtest account which occurred several months after the collection suit was initiated and was noted with respect to an application for pension benefits by Sealtest employee George Craft.

3. Mr. George Faulkner, a co-employee of Mr. Thomas Frawley of the Plan Development and Participation Group, next reported upon the effect of non-compliance with the various Sealtest collective bargaining agreements and the effect the arrearage which is now due and owing will have upon actuarial soundness of the Fund. Mr. Frawley also reported concerning the availability of retirement benefits for Sealtest employess. The report indicated that one requirement established for the receipt of benefits which has been made by the Trustees pursuant to Article VII of the Trust Agreement makes it necessary for a retiring employee applying for benefits to

have had 20 years of credited service. This requirement would include certain various contribution requirements depending upon the year in which participation began.

4. Mr. Edward J. Murtha reported that in May of 1979, employee George Craft of Sealtest made application for retirement benefits. A routine examination of his qualifications for eligibility disclosed that three years of required contributions on his behalf between 1969 and 1971 had not been made by Sealtest. Although the required years of contributions had not been made by Sealtest on behalf of employee Craft, a further investigation revealed that such contributions should have been made according to the terms of the applicable Sealtest collective bargaining agreements. Because of this information, a determination was made to approve Mr. Craft's eligibility to receive retirement benefits as it did not seem fair or proper to penalize Mr. Craft because of Sealtest's failure to pay in accordance with the applicable Sealtest collective bargaining agreement.

5. Mr. Frawley reported that as a result of failure of Sealtest to make required contributions on behalf of employee Craft and certain other of its employees, the Fund had been required to provide pension benefits to a person for whom the required contributions have not been made. As a result, the corpus of the Fund was reduced, and if allowed to continue on even a moderate basis, similar reductions would endanger the right of all employee beneficiaries of the Fund because the actuarial soundness of the Fund requires that benefits not be paid to an employee or employees for whom the proper contributions have not been made. Mr. Murtha reported that an examination of records pertaining to the Sealtest account, reveals that any Sealtest employee, who has been employed since 1969, may be in a situation similar to Mr. Craft.

Upon receipt of the foregoing reports, and pursuant to authority vested in the undersigned by Trustee resolution the undersigned decided [that] the question and controversy pertaining to the Sealtest account could and should be resolved by determination as to the construction of the language and meaning of the letter attached as Exhibit 17 to the pre-trial order, the collective bargaining agreements between Sealtest and Teamsters Local 327, and the Trust Agreement. By a comparison of effective dates and execution dates of the various Sealtest collective bargaining agreements attached to the pre-trial order, the undersigned determined the letter was executed by Don Vestal, a former business agent for Teamsters Local 327, at a point in time following agreement upon a collective bargaining agreement for the Sealtest milk plant employees in June of 1969.

After making this determination, it was the decision of the undersigned that a proper construction and meaning of the letter would be such that the letter does not have any force, weight or effect upon pension contributions required in collective bargaining agreements for Sealtest ice cream plant employees. Article III, Section 1 of the Trust Agreement requires continuing and prompt contributions to the Fund as required by the applicable collective bargaining agreements and the letter does not even purport to pertain to collective bargaining agreements for Sealtest ice cream plant employees; it is further

the decision of the undersigned that a proper construction and meaning of the letter would be such that the letter cannot and does not have any force, weight or effect upon pension contributions required in collective bargaining agreements for Sealtest milk plant employees which were entered into after 1969, as Article III, Section 1 of the Trust Agreement requires continuing and prompt payments to the Fund as required by the applicable collective bargaining agreements and the letter does not even purport to refer to those collective bargaining agreements; it is further

the decision of the undersigned that a proper construction and meaning of the letter would probably be such that the letter does not have any force, weight or effect upon pension contributions required in the collective bargaining agreement entered into during 1969 for Sealtest milk plant employees as neither former business agent Vestal or any other person was authorized via Article II, Section 10 of the Trust Agreement to act as agent for the Fund and reduce contributions required by the collective bargaining agreement and, thereby, the Trust Agreement. However, the undersigned voices no decision as to the force, weight or effect of the letter executed by former business agent Vestal insofar as the letter may have had any force, weight or effect upon other provisions of the 1969 collective bargaining agreement for Sealtest milk plant employees. The undersigned specifically refers this question for resolution in the pending collection suit, as additional information is required and not available for consideration by the undersigned at this time; it is further

the decision of the undersigned that any monies received as a result of the above-referenced suit are to be applied to arrearages in the Sealtest account, first to any interest due and then to the oldest unpaid balance of the contributions due as required by Article III, Section 4 of the Trust Agreement; it is further

the decision of the undersigned that local counsel Cecil Branstetter be directed to communicate the foregoing resolution of the controversy and dispute by the undersigned to the Court in which the collection suit is currently pending.

(s) Jack Yarbrough
Operations Director
(formerly Assistant
Executive Director)

APPENDIX I

Relevant Provisions of the LMRA and ERISA

I. LABOR-MANAGEMENT RELATIONS ACT

§ 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept,

any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assign-

ment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended

to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited

from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated

benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.
Pub.L. 93-406, Title I, §2, Sept. 2, 1974, 88 Stat. 832.

§ 1021. Duty of disclosure and reporting

Summary plan description and information to be furnished to participants and beneficiaries

(a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 1024(b) of this title to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 1022(a)(1) of this title; and

(2) the information described in section 1024(b)(3) and 1025 (a) and (c) of this title.

Plan description, modifications and changes, and reports to be filed with Secretary of Labor

(b) The administrator shall, in accordance with section 1024(a) of this title, file with the Secretary—

(1) the summary plan description described in section 1022(a)(1) of this title;

(2) a plan description containing the matter required in section 1022(b) of this title;

(3) modifications and changes referred to in section 1022(a)(2) of this title;

(4) the annual report containing the information required by section 1023 of this title; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

§1024. Filing and furnishing of information

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) Statement of rights

The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this subchapter.

§ 1025. Reporting of Participant's benefit rights

Statement furnished by administrator to participants and beneficiaries

(a) Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

§ 1052. Minimum participation standards

(a)(1)(A) No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates —

(i) the date on which the employee attains the age of 21; or

(ii) the date on which he completes 1 year of service.

(B)(i) In the case of any plan which provides that after not more than 3 years of service each participant has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (ii) of subparagraph (A) shall be applied by substituting "3 years of service" for "1 year of service".

(ii) In the case of any plan maintained exclusively for employees of an educational institution (as defined in section 170(b)(1)(A)(ii) of Title 26) by an employer which is exempt from tax under section 501(a) of Title 26, which provides that each participant having at least 1 year of service has a right to 100 percent of his accrued benefit under the plan which is nonforfeitable at the time such benefit accrues, clause (i) of subparagraph (A) shall be applied by substituting "26" for "21". This clause shall not apply to any plan to which clause (i) applies.

(2) No pension plan may exclude from participation (on the basis of age) employees who have attained a specified age, unless —

(A) the plan is a —

(i) defined benefit plan, or

(ii) target benefit plan (as defined under regulations prescribed by the Secretary of the Treasury), and

(B) such employees begin employment with the employer after they have attained a specified age which is not more than 5 years before the normal retirement age under the plan.

(3)(A) For purposes of this section, the term "year of service" means a 12-month period during which the employee has not less than 1,000 hours of service. For purposes of this paragraph, computation of any 12-month period shall be made with reference to the date on which the employee's employment commenced, except that, in accordance with regulations prescribed by the Secretary, such computation may be made by reference to the first day of a plan year in the case of an employee who does not complete 1,000 hours of service during the 12-month period beginning on the date his employment commenced.

(B) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as may be determined under regulations prescribed by the Secretary.

(C) For purposes of this section, the term "hour of service" means a time of service determined under regulations prescribed by the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(4) A plan shall be treated as not meeting the requirements of paragraph (1) unless it provides that any

employee who has satisfied the minimum age and service requirements specified in such paragraph, and who is otherwise entitled to participate in the plan, commences participation in the plan no later than the earlier of —

(A) the first day of the first plan year beginning after the date on which such employee satisfied such requirements, or

(B) the date 6 months after the date on which he satisfied such requirements,

unless such employee was separated from the service before the date referred to in subparagraph (A) or (B), whichever is applicable.

(b)(1) Except as otherwise provided in paragraphs (2), (3) and (4), all years of service with the employer or employers maintaining the plan shall be taken into account in computing the period of service for purposes of subsection (a)(1) of this section.

(2) In the case of any employee who has any 1-year break in service (as defined in section 1053(b)(3)(A) of this title) under the plan to which the service requirements of clause (i) of subsection (a)(1)(B) of this section apply, if such employee has not satisfied such requirements, service before such break shall not be required to be taken into account.

(3) In computing an employee's period of service for purposes of subsectiion (a)(1) of this section in the case of any participant who has any 1-year break in service (as defined in section 1053(b)(3)(A) of this title), service before such break shall not be required to be taken into account under the plan until he has completed a year of service (as defined in subsection (a)(3) of this section) after his return.

(4)(A) For purposes of paragraph (1), in the case of a nonvested participant, years of service with the employer or employers maintaining the plan before any period of consecutive 1-year breaks in service shall not be required to be taken into account in computing the period of service if the number of consecutive 1-year breaks in service within such period equals or exceeds the greater of —

(i) 5, or

(ii) the aggregate number of years of service before such period.

(B) If any years of service are not required to be taken into account by reason of a period of breaks in service to which subparagraph (A) applies, such years of service shall not be taken into account in applying subparagraph (A) to a subsequent period of breaks in service.

(C) For purposes of subparagraph (A), the term "nonvested participant" means a participant who does not have any nonforfeitable right under the plan to an accrued benefit derived from employer contributions.

(5)(A) In the case of each individual who is absent from work for any period —

(i) by reason of the pregnancy of the individual,

(ii) by reason of the birth of a child of the individual,

(iii) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(iv) for purposes of caring for such child for a period beginning immediately following such birth or placement,

the plan shall treat as hours of service, solely for purposes of determining under this subsection whether a 1-year break in service (as defined in section 1053(b)(3)(A) of this title) has occurred, the hours described in subparagraph (B).

(B) The hours described in this subparagraph are —

(i) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(ii) in any case in which the plan is unable to determine the hours described in clause (i), 8 hours of service per day of such absence,

except that the total number of hours treated as hours of service under this subparagraph by reason of any such pregnancy or placement shall not exceed 501 hours.

(C) The hours described in subparagraph (B) shall be treated as hours of service as provided in this paragraph —

(i) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period of absence is treated as hours of service as provided in subparagraph (A); or

(ii) in any other case, in the immediately following year.

(D) For purposes of this paragraph, the term "year" means the period used in computations pursuant to subsection (a)(3)(A) of this section.

(E) A plan may provide that no credit will be given pursuant to this paragraph unless the individual furnishes to the plan administrator such timely information as the plan may reasonably require to establish —

(i) that the absence from work is for reasons referred to in subparagraph (A), and

(ii) the number of days for which there was such an absence.

§ 1053. Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service	Nonforfeiture percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed —	and sum of age and service equals or exceeds —	then the nonforfeitable percentage is —
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right

to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits —

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount with-

drawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross Reference

For nonforfeitably[1] where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

(E)(i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because —

(I) the plan is amended to reduce benefits under section 1425 or 1441 of this title, or

(II) benefit payments under the plan may be suspended under section 1426 or 1441 of this title.

(b) Computation of period of service

(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 18, except that in the case of a plan which does not satisfy subparagraph (A) or (B) of subsection (a)(2) of this section, the plan may not disregard any such year of service during which the employee was a participant;

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions,[2]

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

(D) service not required to be taken into account under paragraph (3);

(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970;

(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date; and

(G) in the case of a multiemployer plan, years of service —

(i) with an employer after —

(I) a complete withdrawal of such employer from the plan (within the meaning of section 1383 of this title), or

(II) to the extent permitted by regulations prescribed by the Secretary of the Treasury, a partial withdrawal described in section 1385(b)(2)(A)(i) of this title in connection with the decertification of the collective bargaining representative; and

(ii) with any employer under the plan after the termination date of the plan under section 1348 of this title.

(2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 1052(a)(3)(C) of this title.

(C) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as determined under regulations of the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(3)(A) For purposes of this paragraph, the term "1-year break in service" means a calendar year, plan year, or other

12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has not completed more than 500 hours of service.

(B) For purposes of paragraph (1), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

(C) For purposes of paragraph (1), in the case of any participant in an individual account plan or an insured defined benefit plan which satisfies the requirements of subsection 1054(b)(1)(F) of this title who has 5 consecutive 1-year breaks in service, years of service after such 5-year period shall not be required to be taken into account for purposes of determining the nonforfeitable percentage of his accrued benefit derived from employer contributions which accrued before such 5-year period.

(D)(i) For purposes of paragraph (1), in the case of a nonvested participant, years of service with the employer or employers maintaining the plan before any period of consecutive 1-year breaks in service shall not be required to be taken into account if the number of consecutive 1-year breaks in service within such period equals or exceeds the greater of —

(I) 5, or

(II) the aggregate number of years of service before such period.

(ii) If any years of service are not required to be taken into account by reason of a period of breaks in service to which clause (i) applies, such years of service shall not be taken into account in applying clause (i) to a subsequent period of breaks in service.

(iii) For purposes of clause (i), the term "nonvested participant" means a participant who does not have any nonforfeitable right under the plan to an accrued benefit derived from employer contributions.

(E)(i) In the case of each individual who is absent from work for any period —

(I) by reason of the pregnancy of the individual,

(II) by reason of the birth of a child of the individual,

(III) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(IV) for purposes of caring for such child for a period beginning immediately following such birth or placement,

the plan shall treat as hours of service, solely for purposes of determining under this paragraph whether a 1-year break in service has occurred, the hours described in clause (ii).

(ii) The hours described in this clause are —

(I) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(II) in any case in which the plan is unable to determine the hours described in subclause (I), 8 hours of service per day of absence,

except that the total number of hours treated as hours of service under this clause by reason of such pregnancy or placement shall not exceed 501 hours.

(iii) The hours described in clause (ii) shall be treated as hours of service as provided in this subparagraph —

(I) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period of absence is treated as hours of service as provided in clause (i); or

(II) in any other case, in the immediately following year.

(iv) For purposes of this subparagraph, the term "year" means the period used in computations pursuant to paragraph (2).

(v) A plan may provide that no credit will be given pursuant to this subparagraph unless the individual furnishes to the plan administrator such timely information as the plan may reasonably require to establish —

(I) that the absence from work is for reasons referred to in clause (i), and

(II) the number of days for which there was such an absence.

(4) Cross references

(A) for definitions of "accrued benefit" and "normal retirement age", see section 1002(23) and (24) of this title.

(B) For effect of certain cash out distributions, see section 1054(d)(1) of this title.

(c) Plan amendments altering vesting schedule

(1)(A) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer

contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) of this section shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of Title 26.

(3) The requirements of subsection (a)(2) of this section shall be deemed to be satisfied in the case of a class year plan if such plan provides that 100 percent of each employee's right to or derived from the contributions of the employer on his behalf with respect to any plan year are nonforfeitable not later than the end of the 5th year following the plan year for which such contributions were made. For purposes of this part, the term "class year plan" means a profit sharing, stock bonus, or money purchase plan which provides for the separate nonforfeitability of employees' rights to or derived from the contributions for each plan year.

(d) Nonforfeitable benefits after lesser period and in greater amounts than required

A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part.

(e) Nontreatment of accrued benefit as nonforfeitable; calculation of present value

(1) If the present value of any accrued benefit exceeds $3,500, such benefit shall not be treated as nonforfeitable if the plan provides that the present value of such benefit could be immediately distributed without the consent of the participant.

(2) For purposes of paragraph (1), the present value shall be calculated by using an interest rate not greater than the interest rate which would be used (as of the date of the distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

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[1] So in original. Probably should be "nonforfeitability".

[2] So in original. The comma should probably be a semicolon.

§ 1054. Benefit accrual requirements

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(2) of this section, and in the case of a defined benefit plan shall also satisfy the requirements of subsection (b)(1) of this section.

(b) Enumeration of plan requirements

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than —

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33⅓) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the

accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133⅓ percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph —

(I) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no

more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of particpation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of —

(i) is accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the terms "years of service" has the meaning provided by section 1052(a)(3)(A) of this title.

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan —

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 1081(b) of this title (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 1081(b) of this title were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act [42 U.S.C.A. § 401 et seq.] which benefits under the plan —

(i) do not exceed security benefits, and

(ii) terminate when such social security benefits commence.

(2) A plan satisfies the requirements of this paragraph if —

(A) in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and

(B) in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each employee's accrued benefit.

(3)(A) For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 1052(b) of this title, determined without regard to section 1052(b)(5) of this title) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

(B) For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis.

(C) For purposes of this paragraph, in the case of any employee whose service is less than 1,000 hours during any calendar year, plan year or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the secretary) the calculation of his period of service shall not be treated as not made on a reasonable and consistent basis merely because such service is not taken into account.

(D) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of participation" shall be such period as determined under regulations prescribed by the Secretary.

(E) For purposes of this subsection in the case of any maritime industry, 125 days of service shall be treated as a year of participation. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(c) Employee's accrued benefits derived from employer and employee contributions

(1) For purposes of this section and section 1053 of this title an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2)(A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is —

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and the income, expenses, gains, and losses attributable thereto, or

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B)(i) In the case of a defined benefit plan providing an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the accrued benefit derived from contributions made by an employee as of any applicable date is the annual benefit equal to the employee's accumulated contributions multiplied by the appropriate conversion factor.

(ii) For purposes of clause (i), the term "appropriate conversion factor" means the factor necessary to convert an amount equal to the accumulated contributions to a single life annuity (without ancillary benefits) commencing at normal retirement age and shall be 10 percent for a normal retirement age of 65 years. For other normal retirement ages the conversion factor shall be determined in accordance with regulations prescribed in the Secretary of the Treasury or his delegate.

(C) For purposes of this subsection, the term "accumulated contributions" means the total of —

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 1053(a)(2) of this title does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually at the rate of 5 percent per annum from the beginning of the first plan year to which section 1053(a)(2) of this title applies (by reason of the applicable effective date) to the date upon which the employee would attain normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts contributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) The Secretary of the Treasury is authorized to adjust by regulation the conversion factor described in sub-

paragraph (B), the rate of interest described in clause (iii) of subparagraph (C), or both, from time to time as he may deem necessary. The rate of interest shall bear the relationship to 5 percent which the Secretary of the Treasury determines to be comparable to the relationship which the long-term money rates and investment yields for the last period of 10 calendar years ending at least 12 months before the beginning of the plan year bear to the long-term money rates and investment yields for the 10-calendar year period 1964 through 1973. No such adjustment shall be effective for a plan year beginning before the expiration of 1 year after such adjustment is determined and published.

(E) The accrued benefit derived from employee contributions shall not exceed the greater of —

(i) the employee's accrued benefit under the plan, or

(ii) the accrued benefit derived from employee contributions determined as though the amounts calculated under clauses (ii) and (iii) of subparagraph (C) were zero.

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(4) In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an

employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

(d) Employee service which may be disregarded in determining employee's accrued benefits under plan

Notwithstanding section 1053(b)(1) of this title, for purposes of determining the employee's accrued benefit under the plan, the plan may disregard service performed by the employee with respect to which he has received —

(1) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in an amount (not more than $3,500) permitted under regulations prescribed by the Secretary of the Treasury, or

(2) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to receive.

Paragraph (1) shall apply only if such distribution was made on termination of the employee's participation in the plan. Paragraph (2) shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary of the Treasury.

(e) Opportunity to repay full amount of distributions which have been reduced through disregarded employee service

For purposes of determining the employee's accrued benefit, the plan shall not disregard service as provided in subsection (d) of this section unless the plan provides an opportunity for the participant to repay the full amount of a distribution described in subsection (d) of this section with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this sec-

tion and provides that upon such repayment the employee's accrued benefit shall be recomputed by taking into account service so disregarded. This subsection shall apply only in the case of a participant who —

(1) received such a distribution in any plan year to which this section applies, which distribution was less than the present value of his accrued benefits,

(2) resumes employment covered under the plan, and

(3) repays the full amount of such distribution with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this section.

In the case of a defined contribution plan, the plan provision required under this subsection may provide that such repayment must be made before the participant has 5 consecutive 1-year breaks in service commencing after such withdrawal.

(f) Employer treated as maintaining plan

For the purposes of this part, an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of —

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(h) Cross reference

For special rules relating to class year plans and plan provisions adopted to preclude discrimination, see sections 1053(c)(2) and (3) of this title.

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29 C.F.R. 2530.200b-2

§ 2530.200b-2 Hour of service.

(1) An hour of service is each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer during the applicable computation period.

§ 1059. Recordkeeping and reporting requirements

(a)(1) Except as provided by paragraph (2) every employer shall, in accordance with regulations prescribed by the Secretary, maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees. The plan administrator shall make a report, in such manner and at such time as may be provided in regulations prescribed by the Secretary, to each employee who is a participant under the plan and who—

(A) requests such report, in such manner and at such time as may be provided in such regulations,

(B) terminates his service with the employer, or

(C) has a 1-year break in service (as defined in section 1053 (b)(3)(A) of this title).

The employer shall furnish to the plan administrator the information necessary for the administrator to make the reports required by the preceding sentence. Not more than one report shall be required under subparagraph (A) in any 12-month period. Not more than one report shall be required under subparagraph (C) with respect to consecutive 1-year breaks in service. The report required under this paragraph shall be sufficient to inform the employee of his accrued benefits under the plan and the percentage of such benefits which are nonforfeitable under the plan.

(2) If more than one employer adopts a plan. each such employer shall, in accordance with regulations prescribed by the Secretary, furnish to the plan administrator the information necessary for the administrator to maintain the records and make the reports required by paragraph (1). Such administrator shall maintain the records and, to the extent provided under regulations prescribed by the Secretary, make the reports, required by paragraph (1).

(b) If any person who is required, under subsection (a) of this section, to furnish information or maintain records for any plan year fails to comply with such requirement, he shall pay to the Secretary a civil penalty of $10 for each employee with respect to whom such failure occurs, unless it is shown that such failure is due to reasonable cause.

APPENDIX J

Department of Labor Advisory Opinion Letters on Delinquent Contributions

DEPARTMENT OF LABOR ADVISORY OPINION LETTERS ON DELINQUENT CONTRIBUTIONS*

August 31, 1976
Opinion 76-89
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(Re: 10 Civil Actions)

Dear Mr. Dower:

The Secretary of Labor has been served with copies of complaints filed on your behalf in the above-cited cases. While at the present time we do not propose to exercise our right to intervene in any of these cases pursuant to section 502 (h) of the Employee Retirement Income Security Act of 1974 (ERISA), we nonetheless wish to inform you of our views on two matters referred to in your complaints.

Paragraph 11 of each of your complaints states:

> Unless the Pension Fund receives the contributions due it and can credit the same to the Defendant's employees, those employees will not be entitled to credit for hours worked which will result in their ineligibility for pension benefits upon retirement.

Without expressing any opinion on the law as it existed prior to the effective date of the Employee Retirement Income Security Act of 1974 (ERISA), I would advise you that in our opinion the substance of the position expressed in that paragraph is not lawful under ERISA. ERISA sections 202, 203, and 204, 29 U.S.C.A. §§1052, 1053 and 1054, set minimum participation, vesting and benefit accrual standards which are binding on all covered pension plans. All three sections provide that the satisfaction of their requirements be based solely on each participant's years of service. A "year of service" is defined as the completion of 1,000 hours of service within a designated 12-month period.

The definition of the term "hour of service" was specifically reserved for determination by the Secretary of Labor through appropriate regulations.

On September 8, 1975, a definition of the term "hour of service" was published in the *Federal Register*. Section 2530.200b-2(a)(1) states, "An hour of service is each hour for which an employee is directly or indirectly paid, or entitled to payment, by the employer for the performance of duties during the applicable computation period . . ." Although the Department of Labor will be making certain modifications in these regulations, none of the proposals under consideration would cause a change *in our present position that credit must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions. Any plan term or Trustees' resolution to the contrary is, in our judgment, unlawful and unenforceable.*

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December 5, 1978

OPINION 78-28 A
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408(c)
410(a)

Harry A. Dower, Esq.
Dower, Yarema & Co., P.C.
First Valley Bank Building
Center Square
P.O. Box 950
Allentown, Pennsylvania 18105

Re: Central Pennsylvania Teamsters Pension Fund and Teamsters Local 429 Health and Welfare Fund

Dear Mr. Dower:

This is in response to your correspondence of April 18, 1977, May 24, 1977, and August 8, August 16, August 21,

August 31, and November 9, 1978, in which among other matters you request advisory opinions regarding the collection of delinquent employer contributions and the crediting of service in a pension benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA). In addition, you request an advisory opinion regarding the compensation of the trustees of the subject plans. You have supplied us with plan documents and other information. . . . . .

With respect to the first matters mentioned above, you request an opinion whether a multiemployer pension plan may provide that a participant shall accrue benefits only upon the payment of contributions by the employer required to make such contributions. You also request an opinion whether there is an extension of credit by a multiemployer plan to a party in interest where a contributing employer is delinquent in making its required contribution to the plan and the trust instrument provides that the trustees of the plan have no obligation to collect delinquent employer contributions. In connection with this request you also inquire whether the trustees, in the exercise of their discretion under the trust instrument, may adopt a policy not to sue for the collection of delinquent employer contributions.

With regard to the question of whether benefit accrual may be limited to hours for which contributions are received, sections 202, 203 and 204 of ERISA set forth the minimum standards for participation, vesting and benefit accrual. The Department is of the view that, at least for purposes of participation and vesting, credit may not be limited to service for which contributions are actually made. Where no distinction is made between credit for vesting and credit for accrual, all credit must be given solely on the basis of service performed for an employer sponsoring the plan, regardless whether that employer is required to con-

tribute for such service or has made or defaulted on his required contributions.[1] Accordingly, those provisions of the plan documents you submitted which limit employee entitlement by reference to the receipt of employer contributions are not, in our opinion, lawful under ERISA.

Concerning the collection of delinquent employer contributions, you argue that nothing in ERISA directly obligates plan trustees to collect such contributions. You further argue that it is only in connection with an extension of credit by a plan to a party in interest, prohibited under section 406(a)(1)(B) of ERISA, that the question arises. Your letter concludes that, in a multiemployer plan, where the terms of the plan state that no benefit credit will be given until a contribution is actually received by the plan even though a participant has performed the required hours of service, there is no extension of credit to a party in interest and therefore no prohibited transaction.

We do not agree with your argument that, because the plan does not become obligated to pay benefits with respect to particular service until the relevant contribution is received, failure to collect the contribution does not result in an extension of credit by the plan. This is because we do not agree with your premise that benefit credit can be withheld until the contribution is received. As stated above, it is the opinion of the Department that credit must be given on the basis of service, regardless of whether the employer is required to contribute for such service or has made or defaulted on required contributions.

Moreover, in Prohibited Transaction Exemption 76-1 (41 FR 12740, March 26, 1976), the Department stated that multiple employer plans which do not establish and implement reasonable, diligent and systematic collection procedures may be found to be engaging in prohibited transactions under sections 406 and 407(a) of ERISA. The Department also stated that arrangements, agreements or under-

standings whereby a multiple employer plan agrees to the late or delayed payment of employer contributions or payment of less than the full amount of a delinquent contribution, or writes off such a contribution as uncollectable, may also constitute prohibited transactions under those sections.

The collective bargaining agreement which you forwarded to this office requires, in Articles 49 and 50, that employers make contributions to the welfare plan and the pension plan, respectively. The plan trustees are in a position to enforce that duty on behalf of the two plans, and their failure to do so could, in our judgment, result in a violation of section 404(a) of ERISA. To the extent that section 404(a) imposes upon the trustees a duty to collect delinquent contributions, any provision in the plan instruments purporting to relieve the trustees of that duty, or of the power to carry it out, is void under section 410(a).

(2)

No. 86-881

In The
Supreme Court of the United States
October Term, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and DANIEL J. SHANNON,

Petitioners,

v.

KRAFTCO, INC., d/b/a
Sealtest Foods Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a multi-employer pension fund possesses an implied right, not expressed by contract or statute, to reject collectively bargained pension agreements reached in compliance with federal labor law and negotiated between an employer and the exclusive bargaining representative of bargaining unit employees and pension plan beneficiaries.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. Record Facts

For many years prior to the filing of the Complaint giving rise to this proceeding, Kraftco, Inc.[1] and Local 327 of the International Brotherhood of Teamsters Union had engaged in collective bargaining. In the course of numer-

[1]Respondent filed with the Court of Appeals a certificate indicating that Kraftco, Inc. (the corporate predecessor of Kraft, Inc.) is a wholly owned subsidiary of Dart & Kraft, Inc. At the end of November 1986, Kraft, Inc. merged into Dart & Kraft, Inc. and is now known as Kraft, Inc., a publicly traded corporation.

ous negotiations of renewal labor agreements, the parties collectively bargained for the terms and conditions of employment for employees within the three bargaining units at issue in this proceeding. The labor relationship between Kraftco and Local 327 has been amiable and peaceful. At trial, current Local 327 business agent Billy Burrows testified that Kraftco has always been "a very fair company" which honors agreements reached with the Union. (Tr., pp. 163, 164).[2]

In 1966 Kraftco and Local 327 reached an agreement with regard to pension entitlement for bargaining unit employees which is not under attack in this proceeding. In that year the parties agreed to defer pension contributions for employees until they acquired thirty-six months of seniority within the bargaining unit. (Petition Appendix, p. 85). It is undisputed that there was no change in the parties' contribution practices from 1966 until 1978.

The thirty-six month deferral practice which began in 1966 was designed to accommodate the substantial employee turnover in the affected bargaining units. (Petition Appendix, p. 104). The deferred contribution practice allowed for a higher wage level than would have been possible if monthly pension contributions were paid on behalf of short-term employees who never expected to realize retirement income. The Fund does not now and has never

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[2]The Pension Fund noted in its Petition for *Certiorari* at footnote 2 that Local 327 is not seeking review of the consolidated Court of Appeals Judgment which is the subject of the Fund's Petition. Accordingly, the Sixth Circuit's declaration of rights and responsibilities in the companion case between Kraftco and Local 327 has not been made the subject of a timely petition for *certiorari* filed with the Court.

alleged that the thirty-six month deferral practice was illegal under any contractural or statutory provision in effect in 1966.

In 1969, the collective bargaining agreements were subject to renewal negotiations. Although an International Teamster representative indicated his displeasure with the thirty-six month deferral practice, the Local Union president and the bargaining committee clearly were content to maintain the arrangement as part of their labor agreement. The thirty-six month deferral practice was continued in effect between the parties by a letter agreement executed on June 27, 1969, by the parties' authorized representatives. (Petition Appendix, p. 98).

The manner in which labor agreements were negotiated by the parties and their contents communicated to bargaining unit members is instructive. At union ratification meetings, bargaining unit employees were apprised only of *changes* in the collective bargaining agreement that had been negotiated between the parties. (Tr., p. 163). The written contract did not exist at the time of a ratification vote and employees were told verbally by their union representative of negotiated modifications. (Tr., p. 148, 163). Accordingly, where there was no change in the terms which existed in a prior collective bargaining agreement, the work force was informed of no modification. The thirty-six month deferral practice which began in 1966 continued unabated until 1978.

The parties' open discussion of the continuation of the deferral practice through the course of the 1969 negotiations has been amply attested. In the 1969 negotiating sessions, with the Local 327 bargaining committee present, the president of Local 327 agreed to work out contract

language and provide the company with a letter agreement which would continue the thirty-six month contribution practice. (Tr., p. 101, 105, 106, 134, 135). There was no evidence to the contrary. Although the parties did not discuss revision of the deferral practice in later renewal negotiations, the union's bargaining committee discussed the effect of the deferral practice and clearly was aware of its impact in 1972 and 1975. (Tr., p. 135-139).[3] The unrefuted evidence also establishes that the parties intended the thirty-six month deferral practice to continue indefinitely, or until the parties modified their agreement as to each of the three bargaining units covered by the relationship between Kraftco and Local 327. (Petition Appendix, p. 68).

Nowhere in the collective bargaining agreements, letter agreement or pension plan documents (Supplemental Appendix 3) have the parties to the labor agreement conferred upon the Fund a right to reject the negotiated pension agreement. Nowhere do any of the foregoing documents confer upon Kraftco an obligation to produce copies of all relevant documents and collective bargaining agreements to the Fund except upon express request by the Fund. The Fund has neither contended nor established that Kraftco ever refused to provide any documents requested by the Fund or an explanation of Kraftco's contribution practices during the entire twelve year duration of the thirty-six month contribution practice.

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[3]As to bargaining unit knowledge and ratification of the thirty-six month deferral practice, the "sole evidence on this issue" was the testimony of James Dreaden. His testimony was never refuted by the testimony of any witness for the Fund. (Petition Appendix, p. 63).

The letter agreement specifically provided for "discussion and adjustment" in the event any employee was adversely affected by the thirty-six month contribution practice. The stated purpose of this language was to protect any employee who may have had pension entitlement adversely affected by the deferral practice. (Tr., pp. 104, 105). The sole evidence adduced concerning the impact of the deferral practice reveals that only two employees have been affected by the practice. In 1979 Kraftco tendered payment to the Fund pursuant to its agreement with Local 327 on behalf of an employee apparently affected by the thirty-six month contribution agreement. (Tr., pp. 32, 33, 106, 107; Supplemental Appendix 1, p. 2a). However, the Fund returned Kraftco's tender "consistent with the litigation posture" of the Fund. (Supplemental Appendix 1, p. 3a). The employee was not deprived of retirement benefits.

The second employee affected by the deferral practice was identified in 1981. Again, Kraftco tendered pension contributions on behalf of that employee pursuant to its agreement with Local 327. (Tr., pp. 107, 108; Supplemental Appendix 2, p. 6a). On this occasion, the Fund accepted Kraftco's tender and assessed interest on the contributions occasioned by their delinquency, which also was paid by Kraftco. Supplemental Appendix 2, pp. 8a-11a).

The evidence clearly reveals that no employee has been denied pension benefits as a result of the deferral practice. Furthermore, the Fund's actuarial integrity was explicitly protected by Kraftco's tender of sums on behalf of any employee whose pension entitlement was affected by the deferral agreement. There was no proof that any employee was harmed by the deferral practice. There has been no proof that Kraftco refused to make any employee whole

pursuant to the letter agreement or tender contributions to the Fund on behalf of any affected employee. There was no showing that Kraftco ever failed to make full disclosure with regard to its contribution practices consistent with its agreement with Local 327.

2. Course of Proceedings Below

In 1978, Central States filed its Complaint against Kraftco under the provisions of 29 U.S.C. §§ 185, 1132 and 1145.[4] Thereafter, Kraftco sought to join Local 327 as a necessary party to the Fund's Complaint, which motion was denied by the district court. Accordingly, in 1979 Kraftco filed its declaratory judgment action against Local 327 pursuant to the provisions of 29 U.S.C. § 185 and 28 U.S.C. §§ 1337, 2201 and 2202. (Petition Appendix p. 40). The trial court then consolidated the two cases for joint disposition.

In late 1979, the parties filed cross motions for summary judgment in the consolidated cases. In 1981, the trial court granted Local 327's motion to dismiss Kraftco's declaratory judgment action. However, the court ruled that the action between the Fund and Kraftco raised factual issues requiring a trial because the "resolution of the central dispute in this action depends upon the intent of Kraftco, Inc. and the Union." 527 F. Supp. 420, 422 (M.D. Tn. 1981). Kraftco appealed and the Court of Appeals reversed the district court's dismissal of Kraftco's Complaint.

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[4]The Complaint also raised assorted state law theories of recovery which the Sixth Circuit disposed of adverse to the Fund's claims. The Fund does not seek review of the dismissal of its state law claims.

683 F.2d 131 (6th Cir. 1982). The Court of Appeals noted the anomalous nature of the trial court's dismissal of a party to the contract where the "central issue in dispute" between Kraftco and the Fund involved the contractual intent of Kraftco and Local 327. This contractual intent could not be resolved simply by referring to the collective bargaining agreements. There was a patent ambiguity in the language of the collective bargaining agreements. Accordingly, the Fund was not clearly entitled to the remedies it sought and its summary judgment motion was denied.

After a trial held on March 15, 1982, the court's judgment entered on May 9, 1984, in favor of the Fund. 589 F. Supp. 1061. The trial court found for the Fund on the basis of asserted trust fund rights derived from the common law of the State of Illinois. Further, the court invalidated the letter agreement as a result of a Section 302(c) (29 U.S.C. § 186) analysis which was accepted by neither the panel decision of the Sixth Circuit (Petition, Appendix B) nor the *en banc* Opinion of the Court of Appeals. 799 F.2d 1098. The only appellate support for the Fund's Section 302(c) arguments was contained in Judge Jones' *per curiam* affirmance in the panel Opinion which was later abandoned by Judge Jones in the *en banc* deliberations concerning the Section 302 issue. Accordingly, a unanimous Court of Appeals has concluded that the trial court's reliance on state law and Section 302 provides no legal basis for the Fund's cause of action.

The *en banc* Court of Appeals for the Sixth Circuit, consisting of thirteen circuit judges, found nothing in the facts or the law which invalidated the agreement negotiated by Kraftco and Local 327. The court concluded that

the Fund suffered no injury and that Kraftco had committed no illegality under this nation's federal labor and pension laws. The *en banc* court held that the letter agreement of June 27, 1969, served to detail the agreement actually and lawfully reached between Kraftco and Local 327 concerning Kraftco's obligations to contribute to the Fund on behalf of bargaining unit employees. The "overwhelming evidence" is that the letter agreement was neither secret nor an illegal attempt to circumvent Kraftco's contribution obligations. (Petition Appendix, p. 68).

SUMMARY OF ARGUMENT

The Fund's Petition for a Writ of *Certiorari* should be denied primarily because the Fund's claimed injury is speculative rather than real. The concerns addressed by the Fund's argument are theoretical and not premised in the facts of this case.

Additionally, review should be denied because the Court of Appeal's unanimous *en banc* decision is clearly consistent with the federal scheme of collective bargaining and pension entitlements. No provision of Congress or statutory construction by this Court is offended by the judgment on review. To the contrary, the Fund seeks an extension of existing law which is inconsistent with prior decisions of this Court.

Finally, the request for a writ should be denied because the decision subject to review is consistent with the decisions of this Court as well as other Courts of Appeal and no important public policy issue is raised by the facts

of this case which would warrant this Court's exercise of its discretionary jurisdiction.

ARGUMENT

The Fund's request for review seeks to undermine long established principles of federal labor law arising under the Labor Management Relations Act. 29 U.S.C. § 185. These federal labor law principles of exclusive representation constitute the legal predicate upon which ERISA rights are premised, as recognized by ERISA itself. 29 U.S.C. §§ 1132, 1145. Congress clearly intended that pension obligations created through the process of collective bargaining would remain subject to and derivative of rights and responsibilities recognized by federal labor law policies expressed by the enactment of Sections 301 and 302 of the Labor Management Relations Act. (29 U.S.C. §§ 185, 186).

I. Where There Has Been No Injury in Fact, the Fund's Speculative Claims Arising in a Case of "First Impression" Are Not Appropriate for This Court's Discretionary Review.

The Fund properly concedes that this case is "one of first impression." (Petition, p. 5). However, without regard to the facts adduced at trial, the Fund would have this Court perceive that substantial injury will be suffered by the Fund and its beneficiaries unless the Court of Appeal's unanimous *en banc* decision is overturned. Clearly, the Fund's concern is prospective rather than retrospective. The Fund argues that the decision under review in some manner may serve as "an invitation" to employers and unions to enter into illicit agreements, the nature of

which are not evidenced in this dispute. In essence, the Fund seeks an advisory opinion with prospective effect, a practice which this Court does not condone. *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

The 1966 deferral practice which was continued through the 1969 letter agreement has had no proven adverse impact on either the corpus of the Fund or on any identified beneficiary. The following determinative facts cannot be contested by the Fund: the 1966 deferral practice embodied in the parties' collective bargaining agreements was not secret, nor did it seek to reduce Kraftco's responsibilities in any unlawful manner. Because the Fund has never challenged the legal efficacy of the 1966 agreement, all arguments concerning the later effect of that agreement as embodied in the 1969 letter agreement fall of their own weight. It is uncontested that from 1966 until 1978 Kraftco's contribution practice remained unchanged. The thirty-six month contribution deferral was detailed either in the 1966 collective bargaining agreements or the 1969 letter agreement. Accordingly, the Fund's rhetoric concerning "modifications" and "secret agreements" is factually unsupported. From 1966 until 1978, the Fund was never given an opportunity to rely upon a contrary definition of Kraftco's rights and responsibilities to the Fund. The Fund has never asserted and certainly has not proven that upon receipt of a collective bargaining agreement negotiated in 1969, the Fund had reason to conclude that Kraftco's pension contribution responsibility was anything other than that which was contained in the 1966 collective bargaining agreement. There is no proof that throughout twelve years of consistent practice the Fund ever inquired of Kraftco nor is there proof that Kraftco misled the Fund.

Because the 1966 deferral practice has never been challenged by the Fund, Kraftco's consistent compliance with its terms over the course of twelve consecutive years cannot constitute a "modification" or "reduction" of Kraftco's obligations to contribute on behalf of the Fund beneficiaries.

Absent proof that the Fund's actuarial computations *were in fact* premised upon a mistaken view of the content of the 1969 collective bargaining agreement, the Fund cannot argue that its financial integrity has somehow diminished. If the Fund's actuarial assumptions were not impaired by the 1966 deferral practice, they could not have been impaired by twelve years of consistent conduct thereafter by Kraftco and Local 327 absent proven misrepresentation by Kraftco.

Factually, the Fund has not been injured except as a result of its affirmative refusal to accept funds tendered by Kraftco on behalf of a single employee affected by the thirty-six month deferral practice. (Supplemental Appendix 1). Pursuant to the express provisions of the 1969 letter agreement, Kraftco tendered contributions on behalf of Mr. Craft in order to make him whole and accordingly maintain the financial integrity of the Fund. The Fund's response to Kraftco's offer was to award Mr. Craft benefits while returning the amount tendered by Kraftco on Mr. Craft's behalf. The only injury to Fund integrity was by the Fund's deliberate litigation-related decision.

In stark contrast to Mr. Craft's circumstance, when Mr. Fred Howell was identified as having been affected by the deferral practice (Supplemental Appendix 2), the Fund accepted the contributions *and assessed interest* in

order to restore the Fund to the financial posture it would have maintained had there been no deferral practice. Kraftco paid the interest assessed and the Fund has offered no reason to believe that Kraftco would not have paid a similar interest assessment on behalf of Mr. Craft or any other employee affected by the thirty-six month deferral provision.

The Fund makes no showing, other than in conclusory and speculative terms, that its actuarial assumptions with regard to benefits payable to the bargaining unit employees of Kraftco would deviate in any manner from the pension entitlements actually claimed by Kraftco's retiring employees. Although the Fund speculates that "secret side agreements" could under some set of circumstances diminish the Fund's actuarial soundness, this case presents no facts which would support the Fund's contentions. Because Kraftco has paid assessed interest in addition to tendered contributions on behalf of employees for whom the Fund has incurred liability, there is no showing of fact which demonstrates that Fund assets "inure to the benefit of an employer in violation of 29 U.S.C. § 1103(c)(1)." (Petition, p. 24).[5]

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[5]The actual, as opposed to theoretical, actuarial impact on the interests of the Fund is clearly *de minimus*. As the parties to the deferral practice understood in 1966, employee turnover in the three bargaining units affected by the deferral practice was such that relatively few employees would ever be affected. That only two have ever been identified since 1966 confirms the reasonableness of the practice. When assessing the benefit ramifications of the contribution practice, the Union correctly estimated that an allocation of monies into higher wages would not adversely affect pension expectations of bargaining unit members.

Although the Fund argues that Kraftco has incurred an obligation to disclose to the Fund all documents which pertain to its pension agreement with Local 327, no such contractual undertaking by Kraftco has been proven by the Fund. A review of the collective bargaining agreement, the trust agreement and pension plan documents reveals no such contractual responsibility has been assumed by Kraftco. Nor has there been any evidence that the Fund requested pertinent documentation which Kraftco declined to produce. Accordingly, even the Fund's right to request relevant information pursuant to the pension agreement and Section 209 of ERISA (29 U.S.C. § 1059) has not been thwarted in any measure by action or inaction on the part of Kraftco. Again, the purported injury the Fund is seeking to remedy is not present in this case.

In the same manner, no provision of ERISA or any pertinent pension-related contractual commitment of Kraftco provides the Fund with an absolute right to reject contributions the Fund deems to be unsatisfactory. The Fund does not seek to reject the contributions made by Kraftco from 1966 until 1969. Accordingly, there can be no cogent reason why the Fund should be entitled to reject contributions beyond 1969 which were made by Kraftco consistent with the 1966 agreement.

In short, the Fund's Statement of Question Presented deprives the requested review of merit by misstating the facts in this case. There was no "secret agreement." There was no attempt "to reduce the employer's contribution obligations" under its collective bargaining agreements. There was no omission of contributions for "covered employees." Finally, the Fund has no statutory or

contractual right to "reject" a pension agreement lawfully negotiated between Kraftco and the exclusive bargaining representative of Kraftco's employees. Because the Fund has shown no actual injury, it would be inappropriate to grant a petition for *certiorari*. The peculiar historical context in which this case arises strongly militates against any argument that this is an issue which can be expected to arise frequently on a recurring basis. A petition for *certiorari* should not be granted here where the issue, although theoretically important, fails to rise "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).[6]

II. The Sixth Circuit's En Banc Decision Supports and Is Consistent With Federal Labor and ERISA Policy.

The Fund's Complaint, the district court Opinion, and the Judgment of the Court of Appeals sitting *en banc* consistently recognize that the Fund's cause of action is premised in the separate but interrelated provisions of 29 U.S.C. §§ 185, 1132 and 1145. The Fund never has suggested that these statutory rights and remedies are inconsistent in any degree. The Fund would be hard pressed to do so.

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[6]In its Reply Brief filed in *Central States v. Whitworth Bros. Storage Company*, Docket No. 86-481, October Term, 1986, the Fund notes that contentions "on behalf of two specially situated individuals cannot compare in importance" to the congressional scheme protecting employee benefit agreements (p. 5). The anomolous irony is heightened—in *Whitworth* the Fund argued to keep contributions mistakenly paid, while in this case the Fund seeks to obtain contributions never agreed to.

An action brought under Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) constitutes a claim for breach of a contract negotiated in the collective bargaining context. The Fund concedes the fundamental fact that, "29 U.S.C. § 1145 creates a statutory cause of action, enforceable by trustees under 29 U.S.C. § 1132(a) (3), if an employer fails to make contributions in accordance with the terms of the collective bargaining agreement." (Petition, pp. 10, 11). Accordingly, the clear congressional touchstone for pension enforcement is the collective bargaining agreement itself.[7]

Actions brought under the provisions of Section 301 of the LMRA are conceptually dependant upon this Court's recognition that Congress intended to create a comprehensive statutory scheme of contract enforcement which would further national labor peace and stability. *Teamsters Local 174 v. Lucas Flour Company*, 369 U.S. 95 (1962). To underscore the Congressional intent to further labor stability, this Court has recognized the principle of exclusive representation embodied in 29 U.S.C. § 159(a). *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). Broad dis-

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[7]As the Fund previously has argued to this Court, "An employer's obligation to contribute to Central States is established in the collective bargaining agreement, which the trustees of the funds have no role in negotiating." Central States' Petition for a Writ of *Certiorari, Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, Docket No. 82-2157, October Term 1982 (July 2, 1983). At footnote 2 of the Fund's Petition in *Central Transport, Inc.*, the Fund also recognized, "ERISA has incorporated principles set forth in the LMRA." Further, in its response to the petition for *certiorari* filed in *Prosser's Moving and Storage Company v. Robbins*, Docket Nos. 82-1860 and 82-1862, October Term 1982 (July 6, 1983), the Fund acknowledged that "Fund trustees stand completely outside of the collective bargaining process."

cretion is afforded a collective bargaining representative to permit accommodation of all the competing interests existing within a bargaining unit. Inevitably, differences in employee interest arise which can be accommodated only by providing the statutory bargaining representative with the discretion to effect outcomes in negotiation that may affect separate classes of employees differently. *Ibid.*

The goal of industrial stability is best served by allowing that degree of freedom of contract in collective bargaining which permits the parties to a labor agreement a wide range of latitude without governmental interference as to the specific terms and conditions of employment. *H. K. Porter Co., Inc. v. NLRB*, 397 U.S. 99 (1970). The congressional policy favoring industrial stability and labor peace through freedom of contract is not served when third parties, private or governmental, seek to control the substantive outcome of collective bargaining.

Enforcement actions brought under Section 301 of the Labor Management Relations Act are measured by federal labor contract law principles. *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957). The contractual principles governing collective bargaining agreement interpretation and enforcement recognize the unique nature of the ebb and flow of industrial relations. Labor contract interpretation cannot be relegated to the subtle niceties of ordinary contract law. The collective bargaining agreement is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The labor agreement is a "living document" not

confined to the four corners of the labor contract. *Porter, supra*, at 108.

Accordingly, welfare benefit rights established through the course of collective bargaining can only be measured by the collective bargaining agreement itself. *Lewis, et al., Trustees v. Benedict Coal Company*, 361 U.S. 459 (1960). It is the contract, "which is the measure of the third party's rights," 361 U.S. at 467. With reference to the collective bargaining representatives' rights and responsibilities in the negotiation of retiree benefits, it is clear that unions may bargain for increased wages in lieu of retiree benefits without violating federal labor laws. *Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Company*, 404 U.S. 157 (1971). In *Chemical Workers*, this Court also recognized that retirees may rely on the collective bargaining agreement and actions brought under Section 301 to enforce their collectively negotiated pension rights.

ERISA was enacted against this federal labor policy backdrop. In *Nachman Corp. v. Pension Benefit Guarantee Corporation*, 446 U.S. 359 (1980), this Court observed that through ERISA Congress merely insured that a promise to an employee of a specific defined pension benefit at the time of retirement would be received if the employee satisfied the conditions required to obtain the benefit. 446 U.S. at 375. However, this Court has further observed that Congress intended to leave the role of defining the benefit that cannot be forfeited "largely to the private parties creating the plan. That the private parties, not the government, control the level of benefits is clear from the statutory language. . . ." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).

Because there is no specific benefit level guaranteed by ERISA, the permissibility of side letters negotiated between parties to the collective bargaining agreement is not subject to the regulatory strictures of a statutory scheme such as the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*). See *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). In *Barrentine*, this Court recognized that in the absence of a specific statutory proscription, unions may "reasonably and in good faith" sacrifice individual interests for the good of the group. 450 U.S. at 742.

Because ERISA defines no specified benefit levels, trustee enforcement actions are limited to the terms of the collective bargaining agreement itself. *NLRB v. Amax Coal Company*, 453 U.S. 322 (1981). Pension plan trustees' rights to enforce collectively bargained contribution obligations are subordinated to the terms of the agreement actually reached through the process of collective bargaining.

> The management appointed and union appointed trustees do not bargain with each other to set the terms of the employer-employee contract; they can neither require employer contributions not required by the original collectively-bargained contract, nor compromise the claims of the union or the employer with regard to the latter's contributions. Rather, the trustees operate under a detailed written agreement, 29 U.S.C. § 186(c)(5)(B), which is itself the product of bargaining between the representatives of the employees and those of the employer.

453 U.S. at 336. Pension plan trustee rights are derived from and defined by the agreement actually reached between the parties in collective bargaining.

> When neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of the collective bargaining contract.

United Mine Workers of America Health & Retirement Funds v. Robinson, 455 U.S. 562, 576 (1982). Thus, Section 302 of the LMRA intervenes only to assure that collectively bargained employee welfare benefit fund contributions go for the employee purposes intended by the parties. It violates the purpose of Section 302(c) to use it as a means to thwart the legitimate expectations of the parties in collective bargaining.

Neither Section 302(c) nor ERISA serves to prohibit union "discrimination" among classes of employees by which benefit agreements are reached in order to serve the variety of union objectives present in any collective bargaining context.

> Section 302(c)(5) plainly does not impose [a] . . . reasonableness requirement. . . . There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when the potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective bargaining agreements because the union need not 'affirmatively . . . represent' [them] or . . . take into account their interests in making *bona fide* economic decisions in behalf of those whom it does represent. [Citing *Chemical Workers, supra.*] Moreover, because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condi-

> tion that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective bargaining agreement.

Robinson, supra, at 576.

The Fund's argument that Section 302(c) of the LMRA constitutes a prohibition of the letter agreement continuation of the thirty-six month deferral practice does not comport with federal labor and ERISA principles recognized by this Court. The letter agreement was merely a single document among the many which comprised the "living contract" with which Kraftco and Local 327 defined their pension agreement. It was open, well-known and consistent with the literal terms of the prior collective bargaining agreement. Accordingly, to invalidate the letter agreement would destroy the legitimate and lawful expectations of both Kraftco and Local 327 at the time of its execution. Section 302(c) of the LMRA does not call for this result.

As this Court has recognized, Section 515 of ERISA, on which Central States also has sued in this case, is a congressional recognition that the entire breadth of federal labor law has been validated and incorporated into the statutory framework supporting the purposes of ERISA. *Kaiser Steel Corp. v. Mullins, et al.,* 455 U.S. 72 (1982). The Fund would have this Court repeal by implication the vast history underlying the federal labor policies embodied in Section 301 of the LMRA. In *Kaiser Steel,* this Court expressly refused to do so.

In *Schneider Moving and Storage Co. v. Robbins,* 466 U.S. 364 (1984), this Court recognized that where compet-

ing considerations arise under Section 301 of the LMRA as opposed to Section 502 of ERISA, the analytical predicate for judicial deliberation is written evidence of contractual intent. Where the parties have expressed their intent in writing, the courts are to give deference to the bargain struck between the employer and the exclusive bargaining representative. Where the parties have expressly defined the benefit levels with written agreements, there is no room for a contrary outcome through judicial construction. Kraftco and Local 327 clearly defined in the collective bargaining agreements of 1966 and the letter agreement of 1969 that contributions would not be paid on behalf of employees until the employees attained thirty-six months' seniority. The Fund's argument to the contrary does not comport with the clear expression of contractual intent evidenced in this case.

Instead, the Fund asks this Court to imply a statutory responsibility on the part of Kraftco to produce all relevant documents to the Fund before the Fund incurs responsibilities. The Fund also argues for a reciprocal right to reject any agreement of which it does not approve. Neither right is expressed by the contracts or documents from which the Fund derives its authority to sue, and neither right nor responsibility is expressly conferred by statute.[8] This Court has recognized its extreme reluctance

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[8]It should be noted that the Fund has never raised the issues of implied statutory rights and responsibilities prior to its Petition for *Certiorari*. As the Fund has acknowledged in its brief in response to the cross-petition for *certiorari* filed in *Whitworth Bros. Storage Company v. Central States,* Docket No. 86-666, October Term 1986, "This Court ordinarily does not decide questions presented" for the first time in a petition for *certiorari,* citing *Youaquim v. Miller,* 425 U.S. 231, 234 (1976).

to imply statutory remedies not expressly conferred by Congress. *Northwest Airlines, Inc. v. Transport Workers Union of America,* 451 U.S. 77 (1981).[9] *See also, City of Milwaukee v. Illinois,* 451 U.S. 304, 313 (1981); *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134 (1985).

Finally, the position urged by the Fund in this case is patently inconsistent with the position taken by the Fund and the ruling of this Court in *Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.,* 472 U.S. 559 (1985). In *Central Transport,* the Fund successfully urged this Court to acknowledge that the Fund's need to conduct employer audits was necessitated by the *voluntary* employer self-reporting scheme envisioned by the trust agreements and pension plan documents. In that case, this Court recognized that the same trust documents on which the Fund now relies create a responsibility on the part of participating employers to make payments to the trust fund only "as required by the applicable collective bargaining agreement." The Fund must acknowledge that its rights are subservient to and dependent upon the bargaining agreement actually reached between the employer and the union through the process of labor negotiation.

Similarly, the trust documents confer a contractual right on the part of the trust fund *to request* the production of records and to examine those records in order to properly administer the trust. The right of examination

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[9]Indeed, the Fund extensively relied upon this principle in its petition for writ of *certiorari* filed in *Central States v. Whitworth Bros. Storage Company,* Docket No. 86-666, pp. 7-13.

and the responsibility of production arises only at such time as the trustees request such examination or production. (*See,* Supplemental Appendix 3, Trust Agreement, Article III, Sections 1 and 5). *Central Transport, supra,* 472 U.S. at —, 96 L.Ed.2d at 451.

The plain fact is that despite the provisions of the trust agreement and despite the fact that ERISA came into play in 1975, Central States sat by passively for a time in excess of twelve years and never once made inquiry, or sought to examine the basis on which Kraftco rendered its contributions. Kraftco had a right to rely on the apparent satisfactory state of its pension compliance. Accordingly, affirmance of the Sixth Circuit *en banc* decision (which was thoroughly well reasoned and unanimously adopted) serves the interest of federal labor and pension policy as previously recognized by this Court.

III. The Fund's Petition for Certiorari Raises No Policy Issues of Sufficient Importance to Warrant This Court's Review.

The Fund's extensive reliance upon the protections afforded by Section 302(c) of the LMRA purports to place "various courts of appeals" at odds with the decision reached by the *en banc* Court of Appeals in this matter. However, this circuit authority "to the contrary" merely recognizes what all courts of appeals dealing with the issue have held: Section 302(c)(5) requires a "writing" in order to satisfy the integrity standards imposed on trust funds negotiated in collective bargaining. The cases cited by the Fund proscribe *oral* agreements in oppo-

sition to or in addition to written collective bargaining agreements.[10]

It is disingenuous at best to argue that Section 302(c)(5) has any preclusive effect on the written documents in evidence in this proceeding. The first appeal to the Sixth Circuit (683 F.2d 131) established the law of the case: the collective bargaining agreements of 1969 could not be interpreted solely by resort to the language contained within them. Accordingly, resort to evidence outside the collective bargaining agreement was essential in order to resolve the "central issue in dispute." To now argue that the 1969 collective bargaining agreements did not contain an implicit ambiguity which could be resolved only by reference to the external letter agreement of June 27, 1969, is a patent afront to efficient judicial administration and the preclusive principles established by the rule of the "law of the case." This Court has recognized that appellate courts "generally refuse to reopen what has been decided." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *See also*, Vestal, *Law of the Case: Single Suit Preclusion*, 1967 Utah Law Review 1. Because the Court of

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[10] *Lewis v. Seanor Coal Company*, 382 F.2d 437 (3d Cir. 1967), *den. cert.*, 390 U.S. 947 (1968) (oral modification of pension agreement violates Section 302(c)(5)(B) of LMRA); *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968), *den. cert.*, 394 U.S. 919 (1969) (trustees justified in refusing to accept contributions pursuant to oral pension agreement); *Manning v. Wiscombe*, 498 F.2d 1311 (10th Cir. 1974) (union acquiescence in employer's contribution practices not in compliance with the collective bargaining agreement not binding on pension fund); *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981) (written pension agreements may not be modified orally by the union and the employer); *Maxwell v. Lucky Construction Company*, 710 F.2d 1395 (9th Cir. 1983) (oral agreement to make pension contributions cannot modify the written collective bargaining agreement).

Appeals for the Sixth Circuit has previously concluded that the parties' intent in negotiating the agreements after 1969 was essential to the resolution of this dispute, the Fund cannot now reopen the fundamental question concerning contractual ambiguity and resort to extra-contract evidence.

The Fund also argues that the Court of Appeals' disposition is at odds with a prior decision of the Eighth Circuit in *Central Hardware Company v. Central States, Southeast and Southwest Areas Pension Fund,* 770 F.2d 106 (8th Cir. 1985), *cert denied,* — U.S. —, 106 S. Ct. 1515 (1986). However, a review of the *Central Hardware* decision reveals that the employer and the union in that case explicitly agreed that their modified pension agreement was subject to review and challenge by the Central States Pension Fund. After negotiating a modification of the pension obligations, a memorandum of understanding was executed by the union and the employer which recognized that the new agreement might violate the terms of the existing pension plan. Although the parties in *Central Hardware* submitted their modification for the approval of the Central States trustees, Kraftco and Local 327 clearly did not so agree.[11] In the absence of written documents evidencing the parties' contractual intent to create trust fund rights and remedies, none should be inferred. *Schneider Moving and Storage, supra.*

Most defective to the Fund's reliance upon the "conflict" between the *en banc* decision and the *Central Hard-*

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[11]Additionally defective to the Fund's arguments premised in *Central Hardware* is the unchallenged fact that the 1969 letter agreement *modified nothing.* It merely continued an agreement first reached in 1966 which the Trust Fund has never challenged.

ware opinion, stands this Court's clearly enunciated policy of denying *certiorari* in the absence of substantial treatment of an issue by various courts of appeals. Even a true conflict (not presented in this case) is insufficient to warrant Supreme Court review where lower federal courts have had an inadequate opportunity to fully develop the procedural and substantive aspects of the issue under consideration. *E.g., Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting).[12]

In the absence of some significant reason to believe the disputed issue in this proceeding shall be a recurring issue, a grant of *certiorari* is inappropriate. Despite the Fund's assertion that plan beneficiaries will be adversely affected, the facts clearly reveal that no employee of Kraftco, no plan beneficiary, nor the Fund itself has been damaged in any real degree by the deferral practice at issue. Purely personal rights do not rise to the level of "public importance" sufficient to warrant Supreme Court review. *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203 (1943).

Similarly, there has been no showing that there are a considerable number of suits involving this issue presently pending in the lower courts which would justify the exercise of this Court's discretionary *certiorari* jurisdiction. *See, Massachusetts Trustees v. United States,* 377 U.S. 235, 237 (1964); *Maryland v. United States,* 381 U.S. 41, 43 (1965).

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[12]*See also,* Justice Brennan, Some Thoughts on the Supreme Court's Work Load, 66 Jurisdiction 230, 233 (1983); Stern and Grossman, Supreme Court Procedure, 6th ed., pp. 197-202 (1985); Cole, Petitioning for *Certiorari* in the Big Case, 12 Litigation 3, p. 33ff (Spring, 1986).

The issue for which the Fund seeks review is only abstractly and speculatively presented in the context of this proceeding. The facts in evidence in this case simply do not warrant the concern expressed by the Fund with regard to perceived diminution of its financial integrity or fiduciary responsibility. Clearly, review of the issue the Fund requests to bring to the Court's attention, even if important, should "await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In summation, the speculative and episodic nature of the issues raised by the Fund's Petition are plainly outside the normal scope of discretionary review extended by this Court to cases of significant public importance. A grant of *certiorari* is customarily reserved for cases where a true and substantial conflict among the various courts of appeals reveals a lack of unanimity on the issue. Accordingly, the grant of this Court's discretionary review would serve no overriding purpose other than to vindicate the interests of the individual parties before the Court.

CONCLUSION

Kraftco, Inc. respectfully requests that the Fund's Petition for a Writ of *Certiorari* to the Court of Appeals for the Sixth Circuit be denied and the well-reasoned, unanimous *en banc* opinion remain undisturbed because, (1) the undisputed facts reveal that the Fund has suffered no particularized injury nor has any beneficiary been deprived of pension benefits as a result of the agreement clearly

reached between Local 327 and Kraftco, (2) the court of appeals' *en banc* decision clearly comports with the overriding statutory structure which defines pension benefits derived from the collective bargaining process, and (3) there is no true "conflict" presented in this case and if any conflict in principle exists, insufficient judicial attention has been directed at the issue to provide this Court with the adjudicatory reasoning from the lower courts which typically accompanies cases warranting this Court's discretionary review.

Respectfully submitted,

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(205) 252-9321

Attorneys for Respondent.

No. 86-881 3

In The

Supreme Court of the United States

October Term, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and DANIEL J. SHANNON,

Petitioners,

v.

KRAFTCO, INC., d/b/a
Sealtest Foods Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

LARRY W. BRIDGESMITH
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2100 West End Avenue
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Attorneys for Respondent.

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APPENDIX 1

Defendant's Exhibit 13

Tender Re: George Craft

(logo)
KRAFT
INC

Dairy Group (Sealtest Foods) June 7, 1979

Central States, Southeast and
Southwest Areas Pension Fund
8550 W. Bryn Mawr Avenue
Chicago, Ill. 60631

Gentlemen:

By letter dated May 22, 1979, you advised Mr. George Craft, Social Security No. 410-18-7803, a former employee of this company that certain contributions were not made on his behalf. Enclosed herewith please find a check in the amount of $900.00 for contributions covering the employment of Mr. Craft for the period December 30, 1968 through December 31, 1971 as provided by the June 26, 1969 collective bargaining agreement between this company and Local 327 of the Teamsters, Chauffeurs, Helpers, Taxi Cab Drivers Union.

Your cooperation in expediting the crediting of this amount to his pension fund account, and thereafter, the expediting of the processing of his retirement application will be appreciated.

Sincerely yours,

/s/ Royce McClintock

RM/pm

(logo)

CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE AND
PENSION FUNDS

Executive Director
John E. Dwyer

July 27, 1979

Mr. Royce McClintock
Sealtest Foods
Division of National Dairy
Products Corporation
1401 Church Street
Nashville, Tennessee 37203

RE: SEALTEST FOODS — Account #7177000-1204
GEORGE CRAFT — Social Security #410-18-7803

Dear Mr. McClintock:

Please be advised that the situation regarding the above named participant and your correspondence of June 7, 1979 were recently reviewed by the Attorneys' Committee.

After a full discussion a motion was made, seconded and unanimously carried (a) to recommend that Mr. Craft be awarded recognition for his three years of credited service from 1969 to 1971, consistent with the litigation posture of the Pension Fund that there was an employer *obligation* to pay contributions during that period on behalf of Mr. Craft, and that a corresponding decision be reached with respect to the application by Mr. Craft for retirement benefits; (b) to request that similar treatment be afforded to other retired or retiring employees of Sealtest Foods; and (c) to request that our local counsel be instructed that *selective* employer contributions from Sealtest Foods are not acceptable.

In accordance with the action of the Attorneys' Committee, the amount of $900.00 which was submitted by

Sealtest Foods through your office on June 7, 1977 in an attempt to selectively contribute on Mr. Craft's behalf is returned herewith.

July 27, 1979
Mr. Royce McClintock
Page Two

Very truly yours,

/s/ JOSEPH J. BURKE
ASSISTANT COUNSEL

JJB/nwl
Enclosure

cc: Jack Yarbrough
Frank J. Carey
George Psaras
Edward Lienhard
Teresa Hynes
William J. Nellis, Esquire
Gerald A. Goldberg, Esquire

APPENDIX 2

Defendants' Exhibit 14

Tender and Interest
RE: Fred E. Howell

(logo)
KRAFT
INC

Dairy Group

May 20, 1981

Ms. Doris Annetti
Analyst Team Leader
Pension Processing Department
Central States, Southeast and Southwest Areas
Health and Welfare and Pension Funds
P. O. Box 145
Des Plaines, Illinois 60017

Re: Howell, Fred E.
Application for Twenty-Year Service Pension Benefit
S. S. # 411-20-7083

Dear Ms. Annetti:

In response to your letter concerning pension contributions on behalf of the above referenced former employee, enclosed please find our check in the amount of $848.00 which represents the total premiums owed during the period September 27, 1970, through December 30, 1972. Please acknowledge receipt of this amount and the satisfaction of our obligation for contributions on behalf of Fred E. Howell.

Very truly yours,

/s/ L. M. Cochran, Jr.
District Controller

P. O. Box 1128, Nashville, TN 37202, (615) 329-1234

Kraft INC

SEE REVERSE FOR ADDRESS

AIRY GROUP U S *** 02 DATE 05/28/81

CHECK NUMBER 1480153

RY DATE	INVOICE REFERENCE AND AMOUNT		DISCOUNT	NET	
28/81	054795 05/26/81	848.00	0.00	848.00	1493 05
NTRAL	STATES ACT 7000	848.00	0.00	848.00	

19-2
1250

AIRY GROUP U S ***

Kraft INC

439064

E ISSUED /28/81

TO THE ORDER OF
CENTRAL STATES ACT 7000 02 2315173
PEN 7177000-1204
AMER NATL BK PO B 1431
CHICAGO IL -60690

CHECK NUMBER 1480153

PAY AMOUNT
$ 848.00************

EXACTLY $********848DOLLARS00CENTS

VOID OVER $25,000
UNLESS COUNTERSIGNED

W. B. Jordan

TTLE-FIRST NATIONAL BANK

⑈00439064⑈ ⑆125000024⑆ 13996 806⑈

(logo)
CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE AND PENSION FUNDS

August 26, 1981

SEALTEST FOODS
1401 Church Street
Nashville, Tennessee 37203

RE: PENSION BENEFITS
MR. FRED E. HOWELL
SOCIAL SECURITY No.: 441-20-7083
ACCOUNT NO.: 7177000-1204

Gentlemen:

In reference to the above, Mr. Howell is currently applying for Pension Benefits. We have found that interest has not been submitted on Mr. Howell's behalf for the period of May, 1971 through May, 1981.

Mr. Howell is entitled to Pension Credit for this period and your account is being debited for $1,293.86 as detailed below:

FROM	TO	NUMBER OF WEEKS	CONTRACT RATE	AMOUNT
09/27/70	12/26/70	13	@ $6.00	$ 78.00
12/27/70	05/29/71	22	@ $6.00	132.00
05/30/71	11/27/71	26	@ $7.00	182.00
11/28/71	12/25/71	4	@ $8.00	32.00
12/26/71	12/30/72	53	@ $8.00	424.00
			CONTRIBUTIONS	$ 848.00
			INTEREST	445.86
			TOTAL BALANCE DUE	$1,293.86

Please remit full payment of interest in the total amount of $445.86 by September 1, 1981 to the attention of the undersigned. You check for contributions owed in the amount of $848.00 has already been received June 4, 1981. If you have any questions regarding this matter, please call me at (800) 323-2152. Extension 483.

8550 W Bryn Mawr Avenue (312) 693-5300

Chicago, Illinois 60631

SEALTEST FOODS
August 26, 1981
Page Two

Very truly yours,

/s/ Jeffrey J. Jensen
Employer Auditor
Delinquent Account/In-House Employer Audit

JJJ :lam

cc: Mr. Mary Balint, Director, Pension Benefits
Mr. Frank J. Carey, Counsel
Mr. George Psaras, Director, Operations Accounting
Mr. Joseph J. Burke, Assistant Counsel
Ms. Teresa E. Whisson, Manager, Delinquent Account/In-House Employer Audit
Local Union No.: 327, Mr. Dempsey Newell, President
Cecil D. Branstetter, Esquire

PART 1—CHARGES ACCEPTED SINCE THE 07-29-81 BILLING

PREPARED 08/27/81
SEALTEST FOODS
ACCOUNT NO. 7177000-1204

EMPLOYER	TERM	REASON	BEGINNING DATE	HEALTH & WELFARE ADJUSTMENT AMOUNT	PENSION ADJUSTMENT AMOUNT
7177000	1204	DEBIT MEMO	08-25-81	$	$ 848.00
7177000	1204	MANUAL INTEREST	08-25-81	$	$ 445.86
				$ 0.00	$ 1,293.86

PREVIOUS PERIOD ADJUSTMENTS FOR EMPLOYER 7177000

APPENDIX 3

Pension Plan Trust Agreement Provisions

ARTICLE III

§ 1 & § 5

TRUST AGREEMENT
CREATING THE

CENTRAL STATES,
SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND

With all amendments
incorporated as of
January 22, 1970

ARTICLE III

CONTRIBUTIONS AND COLLECTIONS

Section 1. Amount of Contributions—Each Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable Collective Bargaining Agreement between the parties. The obligation to make such contributions shall continue during periods when the Collective Bargaining Agreement is being negotiated, but such contributions shall not be required in cases of strike after contract termination, unless the parties mutually agree otherwise.

. . .

Section 5. Production of Records—Each Employer shall promptly furnish to the Trustees, on demand, the names of its employees, their Social Security numbers, the hours worked by each employee and such other information as the Trustees may reasonably require in connection with the Administration of the Trust. The Trustees may, by their representatives examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust. All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether (a) the company is a corporation and the names of all of its officers; (b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor. The Union will comply with any reasonable request of the Trustees to examine those records of the Union which may indicate the employment record of any employee whose status is in dispute.

APPENDIX 4

Relevant Provisions of the LMRA and ERISA

I. LABOR-MANAGEMENT RELATIONS ACT

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the

United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

§ 1132 Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

. . . .

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

. . . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph [2]) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

. . . .

§ 1145 Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

No. 86-881 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND DANIEL J. SHANNON,
Petitioners,

v.

KRAFTCO, INC., d/b/a
Sealtest Foods Division,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' BRIEF IN REPLY TO OPPOSITION

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QUESTION PRESENTED

When bringing a collection action under ERISA and the LMRA, are the trustees of a multiemployer pension fund bound by a secret agreement between a union and an employer which the fund has had no opportunity to reject, which attempts to reduce the employer's contribution obligations under its collective bargaining agreements, and which, by omitting contributions for three years on covered employees, is inconsistent with ERISA's minimum criteria for participation, vesting, and benefit accrual and therefore creates unfunded liabilities chargeable against the plan?

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KRAFTCO, INC., d/b/a
Sealtest Foods Division,
Respondent.

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

In an effort to persuade this Court that Central States' Petition is not worthy of discretionary review, Kraftco argues that no public policy concerns of significance have been raised; the Pension Fund has suffered no more than speculative harm and therefore seeks merely an "advisory opinion" and "prospective" relief; even if the Pension Fund has suffered harm, the "historical" context in which this "episodic" litigation arose makes "recurrence" of such harm unlikely; the Sixth Circuit's opinion is consistent with federal labor law and pension policy in that it gives full recognition to the "doctrine of exclusive representation" as well as to the fact that trustees' rights are "derivative of," "limited by," "subordinate" and "subservient" to the "intent" of parties to collective bargaining agreements; the Sixth Circuit's decision is therefore consistent with such decisions of this Court as *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984); and *Central States, et al. v. Central Transport*, 472 U.S. 559 (1985), which purportedly place primacy on the collective bargaining agreement with regard to an employer's rights and obligations to a pension fund. In addition, Kraftco alleges that the Pension Fund's "Question Presented" has misstated the facts and that the Fund has violated the "law of the case" doctrine, thereby "reopening" issues already decided.

This Reply will address these contentions, in particular those arguments that Kraftco raises for the first time in its opposition.

ARGUMENT

1. Significant Public Policy Considerations of Widespread Applicability are at Stake in This Appeal

ERISA, as interpreted by DOL Regulations, advisory opinions, and decisions of this Court, makes clear that fund trustees have statutory obligations that are both independent of the collective bargaining process and absolute. The central issue for review in this appeal is therefore whether, given such absolute statutory liability, fund trustees should be bound by a side agreement which, although intended to endure "in perpetuity," is inconsistent with the written terms of at least nine successive collective bargaining agreements, is inconsistent with ERISA's minimum standards for participation, vesting and benefit accrual, which reduces an employer's contribution obligations by permitting contributions for covered employees to be withheld until the completion of 36 months of service, which therefore creates unfunded liability chargeable to the plan — attributable to these three years of omitted contributions — without the knowledge and consent of the Pension Fund Trustees, and which, as determined by the District Court based on evidence adduced at trial, was not disclosed even to the bargaining units affected.

The question presented can be divided into two principal subissues, both of which raise important considerations of law and policy that will affect the financial integrity of all Taft-Hartley employee benefit funds because they touch upon the boundary line or, at least, a potential conflict between collective bargaining and trust administration. More concretely, these issues present the question whether in view of the absolute liability of trustees to credit service and provide benefits — regardless of employer contributions — in accordance with statutorily-defined minimum criteria (and/or a particular plan), there are certain limits upon the freedom of employers and unions to elect to participate in ERISA plans through the collective bargaining process and at the same time to repudiate resulting funding obligations through the vehicle of an undisclosed collateral agreement.

In response to Kraftco's principal objections, these issues can be framed as follows: is a side agreement entitled to enforcement as part of the "living contract" between the employer and the union

on the sole grounds that the agreement was ratified even though the agreement was not disclosed to the Pension Fund, is inconsistent with the participation standards of ERISA (as well as with those of the Central States Pension Plan) and imposes unfunded liabilities on the Fund that could have been avoided had the parties' "intent" been incorporated in a collective bargaining agreement that was submitted to the Fund in the ordinary course of business?[1] In other words, does the doctrine of "exclusive representation" — as characterized by Kraftco — override all other considerations so that any pension agreement properly "formed" (i.e. negotiated by authorized representatives and ratified) becomes binding on trustees in an ERISA collection action regardless of its secrecy (vis-a-vis the trustees) and regardless of its deviation from ERISA or the requirements of a fund?

Second, is a side agreement of the type at bar entitled to enforcement as an executed "bargain" even if it was not disclosed to the bargaining unit, was not ratified, and was not disclosed to the Pension Fund solely on the grounds that the union official who executed it had apparent authority to enter into binding agreements concerning the terms and conditions of employment? In other

---

[1] Respondent does not assert that the Pension Fund did not receive copies of the post-1969 collective bargaining agreements which deleted reference to Kraftco's 1966 "practice" of withholding contributions for 36 months. There is no testimony at trial, no discovery, and no affidavit to this effect. Indeed, Kraftco suggests the converse at page 10 of its Brief. Nevertheless, although the record is silent and this point is not an issue in this appeal, counsel did search the Fund's records in connection with the preparation of the Petition and found that, in fact, copies of successive collective bargaining agreements from 1969 through 1978 existed in Kraftco's file. Although the District Court appears to have made a finding of fact that the Fund did not have copies of these collective bargaining agreements (Pet. App. 11a), the context in which this reference appears suggests that the court was referring to the "side agreement" about which there was undisputed testimony that it was not disclosed to the Pension Fund. Since the District Court found in favor of the Fund on the grounds that the Trustees had the right to rely on collective bargaining agreements whose terms could not be eroded by secret side agreements (Pet. App. 25a-26a), no other interpretation of this finding seems reasonable. However, even if the Fund did not receive or was not aware of the 1969-1978 collective bargaining agreements prior to the commencement of litigation, it is these documents which would ultimately validate Kraftco's contributions under 302(c)(5) of the LMRA and which would provide the basis both of an employee's claim and the Fund's liabilities, as Mr. Yarbrough's affidavit indicates (Pet. App. 112a). In other words, the *existence* of the collective bargaining agreements, the time when they were *formed*, and the *language contained* in the pension provision of these contracts are alone dispositive in assessing whether the "side agreement" constituted a valid modification. Whether or when the Fund received the collective bargaining agreements might be pertinent, at most, to an estoppel defense which is not the subject of this appeal.

words, does "apparent authority" override even the doctrine of exclusive representation not to mention the strong federal interest in promoting the financial soundness of employee benefit funds and protecting the rights of fund participants and beneficiaries (including those of the employer who entered into the "side agreement")?

The District Court and the Court of Appeals disagreed as to whether the side agreement was ratified. This is, of course, a factual matter that may be regarded as "episodic" in nature, as Kraftco contends. What is *not* "episodic" is the courts' differing views of the *consequences* of a failure to ratify. Of particularly great concern to the Pension Fund is the Court of Appeals' view that the side agreement was enforceable even without ratification because of the union official's apparent authority. If this rationale is left to stand, there is no limit to the variety of deviant practices that can be implemented since "apparent authority" has actually been elevated above the principle of "exclusive representation" and thus the right of employees to participate in the formation of collective bargaining agreements through the universally-accepted practice of ratification. With regard specifically to the Pension Fund, the Court of Appeals' ruling has made the Trustees' rights under ERISA subordinate *not merely* to the labor law doctrine of exclusive representation but to far less relevant common law principles of agency. This is particularly inappropriate considering the well-established fact that unions and employee benefit funds may not and do not themselves exist in an agency relationship but, as a matter of law, are entirely separate entities.

Kraftco has not disputed that two types of agreements existed, one of which was *never* disclosed to the Pension Fund although it purported to "clarify" the term "regular" employee as this term was used in numerous successive collective bargaining agreements between 1969 and 1978. Hence, Kraftco's opposition bypasses Central States' principal concern that employers will enter into collective bargaining agreements as a facade while concealing their true "intent" in a side agreement that is never disclosed to the Fund and, quite possibly, not even to the bargaining unit affected.

The notion that *any* agreement by an employer and a union is entitled to enforcement (whether because it has been ratified or because a union official may be cloaked with apparent authority) has no merit in the context of ERISA and is not a position that can be advanced in reliance either on the statute or decisions of this Court.

All employers' collective bargaining agreements are incorporated by reference in the Central States Trust Agreements (as noted in *Schneider, supra*). They therefore become part of what ERISA terms a "plan document." Under 29 U.S.C. § 1104(a)(1)(D), trustees are required to administer funds in accordance with "plan documents" *unless* the document is inconsistent with ERISA. Since Kraftco's side agreement (even if regarded as part of the "living contract") is inconsistent with ERISA's minimum standards for participation, vesting and benefit accrual and is *also* inconsistent with the Central States Pension Plan (Pet., p. 12), the trustees would not be free to "administer the plan" in accordance with the side agreement: this means that the Trustees could *not* defend a claim for credited service and for benefits on the grounds that an employee was not "covered" until he or she had completed 36 months of service. Indeed, the Yarbrough Affidavit (Pet. App. 109a-114a) reveals the Fund's awareness that the Trustees could not, consistent with ERISA and the Pension Plan, deny credits and benefits in reliance on the side agreement. If the Fund and its Trustees cannot rely on the side agreement in denying service credits and benefits, Kraftco should not be permitted to rely on the side agreement in refusing to fund these credits and benefits.

Kraftco's emphasis on the doctrine of "exclusive representation" and the primacy of the collective bargaining agreement oversimplifies the issue. While *Amax, Schneider* and *Central Transport* are clear that an employer's contribution obligations are limited to the terms of a negotiated collective bargaining agreement, these cases do *not* stand for the proposition that trustees must accept and are bound by undisclosed collateral agreements that do not conform to a pension plan's participation requirements tailored to conform with ERISA's mandates. The present state of the law is that if a nonconforming contract is disclosed to the trustees, the appropriate remedy is to reject the contract together with contributions made thereunder. (Pet., p. 24). Where, as here, it is only an undisclosed side agreement that fails to conform, an appropriate remedy is to disregard the side agreement and enforce the collective bargaining agreement, as the District Court found.

In sum, there is no merit to Kraftco's contention that the issues at bar are "academic," "episodic," unimportant, and not likely to recur. Rather, the Petition raises very serious questions of law and policy concerning the freedom of parties to elect to participate in multiemployer pension plans through the collective bargaining pro-

cess while at the same time repudiating resulting funding obligations through undisclosed side agreements. If side agreements like Kraftco's are enforced in accordance with the Sixth Circuit's reliance on principles of contract formation (ratification) and apparent authority (agency), the integrity of collective bargaining agreements as the true measure of an employer's obligations and a fund's rights and liabilities will be subject to great uncertainty. Likewise, the substantial protections afforded plan participants in *Schneider* and *Central Transport* will be seriously diluted.

2. PETITIONER DOES NOT SEEK AN "ADVISORY OPINION" TO REMEDY "SPECULATIVE HARM"

Kraftco argues that the "side agreement" prevented the Fund from suffering "harm in fact" because the agreement "explicitly" required the company to "make whole" any employee whose "pension entitlement was affected by the deferral agreement." (R.B,. pp. 5-6, 11). Respondent also suggests that absent proof of actuarial harm resulting from the Fund's mistaken belief as to Kraftco's obligations under its collective bargaining agreements from 1969-1978, the Fund's "actuarial integrity" has not been diminished by the side agreement (*id.* at 11). In a word, Kraftco attempts to persuade this Court that the Fund seeks to remedy a phantom injury.

As a preliminary matter, it should be recalled that Kraftco's "make whole" agreement was not needed to make Kraftco's *employees* whole. The Pension Fund was required by *law* to grant benefits to eligible employees independent of the Fund's receipt of Kraftco's "past due" contributions. The issue is therefore whether the "side agreement" made the *Pension Fund* whole. It did not. First, the "make whole" agreement covered only those of Kraftco's employees who became eligible for contributions while still in Kraftco's employ. Kraftco admits that turnover was high in the bargaining units affected by the 36-month deferral practice. (R.B., pp. 2, 12). The inference to be drawn from this admission is that a majority of these employees will have or will become eligible for a retirement benefit, if at all, then while in the employ of a subsequent employer who will not be contractually obligated to fund the initial years of contributions omitted by Kraftco. Second, Kraftco's collective bargaining agreements required contributions on *all* covered employees upon completion of their probationary period (i.e. after 30 or 90 days). The Pension Fund had a right to receive these contributions immediately and without regard to these employees'

ultimate ability to sustain a claim for a retirement benefit. Kraftco's argument, like that of the Court of Appeals, ignores the basic premises of a pooled multiemployer trust fund. In short, Kraftco has not demonstrated how its "make whole" agreement "explicitly" protected the Pension Fund from "actual harm."

Moreover, proof of actuarial harm was not needed in order to establish harm-in-fact. By deferring contributions, and hence participant status, for three years, Kraftco's side agreement on its face failed to conform with ERISA's minimum participation requirements (and *a fortiori* those of the Central States Plan which are more generous). Thus, the agreement *per se* created "unfunded liabilities chargeable against the plan." The legislative history of MPPAA indicates that Congress was disturbed by the cost of collection and intended that collection actions be streamlined and expeditious. 126 Cong. Rec. (H) 23039 (1980). Given a patently nonconforming agreement, the Pension Fund was not required to expend fund assets making needless proofs regarding actuarial harm. Hence, its failure to do so does not render Central States' Petition a request for an "advisory opinion" to remedy "speculative harm."

3. PETITIONER HAS NOT MISSTATED THE FACTS IN ITS "QUESTION PRESENTED" THEREBY "DEPRIVING THE PETITION OF MERIT"

Kraftco's basic contention is that the side agreement was "open," "well-known," and consistent with the employer's contribution "practice" under its 1966 collective bargaining agreement. Kraftco thus objects to Central States' characterization of the side letter as a "secret agreement" that "reduced the employer's contribution obligations under its collective bargaining agreements" and "omitted contributions for covered employees." (R.B., p. 13).

Petitioner seeks affirmance of the District Court's judgment; quite properly, therefore, Central States has adopted the characterization given the "side agreement" by the District Court. In concluding that the "side agreement" was a secret understanding, the District Court relied upon the following *facts*: 1) the 1966 collective bargaining agreement expressly and for the first time permitted Kraftco to withhold contributions for 36 months; 2) during negotiations for the 1969 milk plant contract, an IBT representative unequivocally informed the employer and the union that a three-year deferral period was unacceptable and had to be deleted from the collective bargaining agreement; 3) accordingly, the parties modified

the 1966 pension provision so that the new contract required contributions on all "regular" employees (meaning those who had completed their probationary period as set forth in Article 1 of the same contract); 4) Don Vestal (President of Local 327) met with Kraftco's negotiators (Spencer and Rose) *after* the offending language was deleted from the collective bargaining agreement in order to find a way to perpetuate the company's prior "contribution practice" notwithstanding the language of the new contract; 5) no member of the union bargaining committee was present when the "side agreement" was executed; 6) the parties' "intent" to adhere to the 1966 "contribution practice" was not communicated to the milk plant bargaining unit in 1969 or to any bargaining unit subsequently; 7) the "side agreement" was not disclosed to the new union leadership after Don Vestal was ousted from office for corruption and financial malpractice in 1971 and hence was not raised during negotiations of any collective bargaining agreements after 1969; 8) the "side letter" was not disclosed to the Pension Fund; 9) the union did not become aware of its existence until 1978 when a member of the milk plant bargaining unit (which had supposedly ratified the "side agreement" in 1969) inquired about his pension status and learned from Central States that no contributions had been made for the first three years of his employment; and 10) in 1978, Kraftco immediately began to remit contributions after 30 or 90 days, *in accordance with the terms of the collective bargaining agreement,* although its defense of the "side agreement" was premised upon the collective bargaining agreement's "ambiguity."

Given this "overwhelming evidence" both of a direct and circumstantial nature, a panel of the Court of Appeals affirmed the District Court's decision. As indicated in the Petition, the *en banc* Court's *de novo* treatment of the District Court's factual findings and its departure from the standards set forth in *Anderson v. City of Bessemer,* 470 U.S. 564 (1985), constitute an abuse of appellate discretion to review the findings of the trier of fact. On this basis alone, the judgment should be vacated. There is no basis for Kraftco to argue that the Pension Fund has "misstated" the facts.

Nevertheless, Kraftco contends that the Fund was never given an "opportunity" to believe that the company's "contribution practice" was anything other than that set forth in the 1966 collective bargaining agreement and "detailed" in the "side agreement" of 1969. Kraftco states, further, that Central States' failure to challenge the 1966 collective bargaining agreement together with the

Fund's subsequent "inaction" from 1969 to 1978 caused Kraftco to believe that its "unabated" 36-month deferral "practice" was satisfactory. (R.B., pp. 10-11). Finally, Kraftco argues that since the "side agreement" merely perpetuated prior "practice," it did not constitute a "modification" of the 1969 collective bargaining agreements and hence did not require disclosure to the bargaining unit. (R.B., p. 3). These arguments are flawed because Kraftco confuses its "contribution practice" with its contractual "contribution obligations."

First, it must be emphasized that Kraftco did not establish that the 1966 collective bargaining agreement was unsatisfactory and this contract has never been an issue in the litigation. Thus, the Fund's alleged failure to reject the 1966 collective bargaining agreement has no relevance as a point of departure for Kraftco's estoppel-like argument. Second, Kraftco does not contend that the Pension Fund never received copies of the 1969 collective bargaining agreements and those executed thereafter. These contracts clearly modified the terms of the 1966 collective bargaining agreement. Third, the facts have conclusively established that the "side letter" was not disclosed to the Pension Fund. Hence, Central States had every reason to believe that contributions were required after 30 or 90 days and not as set forth in the 1966 contract. In essence, Kraftco's contention is tantamount to faulting the Pension Fund for failing to object to something which was deliberately concealed from its view.

In sum, Kraftco has not shown that its "contribution practice" was open, well-known and consistent with its "contribution obligations" under operative collective bargaining agreements. Most important, by focusing on the continuity of its "contribution practice," Kraftco appears to have admitted that the change of language in the 1969 collective bargaining agreement together with the "side letter" nullifying that change were *not disclosed to the bargaining unit*, as the District Court found (R.B., p. 3).

4. PETITIONER HAS NOT TRESPASSED AGAINST THE "LAW OF THE CASE"

Kraftco states that the Court of Appeals, in an earlier decision, established the law of the case: namely, that "the collective bargaining agreements of 1969 could not be interpreted solely by resort to the language contained within them" (R.B., p. 24). It thus argues that the Fund "cannot now reopen the fundamental questions con-

cerning contractual ambiguity and resort to extra contract evidence" (R.B., p. 25).

The Pension Fund's principal contention in its present request for review is that the "side letter agreement" did not effectively modify the operative collective bargaining agreements so as to permit Kraftco to withhold contributions for 36 months. Prior to its 1986 decisions, the Sixth Circuit made *no* substantive ruling on this issue. In the earlier appeal referred by Respondent, the Sixth Circuit merely held that the District Court improperly dismissed Kraftco's action against the union because it erroneously treated the company's separate action as a motion for joinder in the Pension Fund's suit. *See Kraft, Inc. v. Local Union 327*, 683 F.2d 131, 133 (6th Cir. 1982). The "law of the case" has no relevance whatever to the merits of Central States' Petition.

CONCLUSION

For the reasons stated in its Petition and in this Reply, Central States respectfully requests this Court to grant its Petition so that some degree of certainty will prevail concerning the ability of undisclosed side agreements to affect the terms of duly executed collective bargaining agreements upon which employees' rights and trustees' obligations are predicated.

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